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# ADVANCING THE LANGUAGE OF HUMAN RIGHTS IN A GLOBAL ECONOMIC ORDER: AN ANALYSIS OF A DISCOURSE

CHRISTIANA OCHOA\*

**Abstract:** Human rights language is particularly attuned to setting out the goals of protecting the world's least protected people. As human rights advocates have entered negotiations with international economic institutions and transnational corporations (TNCs), such negotiations have often resulted in an alternative language to describe the necessity of protecting and promoting human rights. After describing the progressive inclusion of human rights ideas by TNCs, the World Bank, the IMF, and the WTO, this Article argues that, while such inclusion is a benefit to the human rights movement, the creation of an alternative language to describe human rights goals is potentially detrimental. The language of human rights, in order to be understood by those it aims to protect, must, above all, be intelligible and accessible to them. At this early stage of interactions between human rights advocates and international economic actors, human rights advocates should retain and advance the compelling and utopian language of rights.

*Commerce, however necessary, however lucrative, as it depraves the manners, corrupts the language; they that have frequent intercourse with strangers, to whom they endeavor to accommodate themselves, must in time learn a mingled dialect. . . . This will not always be confined to the exchange, the warehouse, or the port, but will be communicated by degrees to other ranks of the people, and be at last incorporated with the current speech.*

—Samuel Johnson<sup>1</sup>

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<sup>1</sup> SAMUEL JOHNSON, SAMUEL JOHNSON'S DICTIONARY: A MODERN SELECTION 25 (E.L. McAdam, Jr. & George Milne eds., 1964) (1755).

## INTRODUCTION

The philosophical origins of human rights as we know them are as recent as modernity.<sup>2</sup> As such, the community of human rights advocates is recent, and the language it uses to articulate its demands and goals remains in flux. The myriad debates defending or advancing a particular definition for a specific human rights problem or transgressive occurrence abound as evidence of this phenomenon.<sup>3</sup> As with any specialized field of study and work—including law<sup>4</sup>—human rights has developed its own “language for a special purpose.”<sup>5</sup> Specialized lexicons have also developed in areas relevant to human rights, such as economics, finance, and the phenomenon of globalization.<sup>6</sup> Moreover, because economics, globalization, and human rights are not entirely independent of one another, they experience cross-pollination of their communities and specialty languages.

This Article discusses characteristics of two of these discourses, that of international economic law and that of human rights, and the points of contact between the two. Although they share philosophical roots in liberal ideals, human rights and international economic law

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<sup>2</sup> See, e.g., Kenneth Minogue, *The History of the Idea of Human Rights*, in HUM. RTS. READER 3, 3–5 (Walter Laqueur & Barry Rubin eds., 1989). “It is easy enough to give a date to inventions like the steam engine, but to say when an idea first became current is much more difficult. In trying to detect this moment, we must use the familiar distinction between the medieval and the modern world.” *Id.* at 5.

<sup>3</sup> For example, the definition of trafficking in women continues to be highly contested. See, e.g., Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 65–68 (1998); Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making It Live Up to Its Potential*, 10 HARV. HUM. RTS. J. 213, 214–16 (1997); Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L. 83, 91–93 (1994).

<sup>4</sup> See ROBIN TOLMACH LAKOFF, TALKING POWER 102 (1990).

<sup>5</sup> The terms “specialized languages,” “professional languages,” and “languages for special purposes” are used synonymously herein and are the terms used in linguistic studies to explain the phenomenon of languages formed by a specific profession to adequately express the nuances that develop in the pursuit of that profession.

Language for special purposes is like a microscope in areas where technical registers develop. Likewise, only small fragments of reality are made the subject of discussion, and from a very peculiar viewpoint at that. Yet the vocabulary that is necessary for taking part in such a discussion is far greater than the lexicon of general language.

FLORIAN COULMAS, LANGUAGE AND ECONOMY 276–77 (1992).

<sup>6</sup> See generally KIUANNE ANTHONY & HENRY LOUIS GATES, THE DICTIONARY OF GLOBAL CULTURE 520 (1997) (defining important cultural contributions and traditions from various regions around the world).

stand as polarized communities, as a result of a decades-long creation of separate instruments and institutions.<sup>7</sup> This separation, however, has never been absolute. In recent decades, human rights actors have questioned this separation in the course of examining the idea that international economic actors should practice a form of social responsibility congruent with the body of law developed in the international human rights system. Specifically, as human rights advocates call into question transnational economic actors and international economic institutions, and continue advancing methods to ensure accountability of their economically-focused globalized counterparts, the two communities come into contact, thus shaping a nexus.

Part I of this Article, by means of setting out a definition of international economic law used throughout the Article, discusses the separation of private and public international law, as well as the distinctions between international business law and international economic law. After giving a general view of each of these domains, it focuses more specifically on the institutions and actors in the international economic demesne. Part II examines the points of contact between the international economic and human rights communities. Particularly, it considers the innovations developed by the two communities to introduce human rights into the market's space, through negotiations and advocacy with transnational corporations (TNCs), and the major international financial institutions: the IMF, World Bank and WTO.

Part III focuses on the professional languages employed in the discourse between the economic and human rights communities. Specifically, it illustrates that the interaction between an economic language and a rights-based language affects both the substance of the discourse and the outcome of the interactions between these two communities. Part III further argues that the protracted interaction and negotiation between economic and human rights advocates creates an alter-language. Although this alter-language facilitates com-

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<sup>7</sup> See, e.g., Norberto Bobbio, *The Great Dichotomy: Public/Private*, in DEMOCRACY & DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 2 (Peter Kennealy, trans.); INT'L ASS'N OF DEMOCRATIC LAWYERS, LAW IN THE SERVICE OF PEACE: TWO CONCEPTS 39, 45 (1963); David Kennedy, *Receiving the International*, 10 CONN. J. INT'L L. 1, 4-5 (1994); Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* ¶ 3 (2000), at <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html> (last visited Oct. 1, 2002); see also Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (noting how the public/private distinction was brought into the core of legal discussion by the evolution of the market as the central legitimating institution).

munication, it may result in excessive compromises by rights advocates. Analogizing to historical linguistic patterns of colonization, Part III describes the potential dangers of language concessions. It recommends a conscious delineation of boundaries for human rights advocates who are in constant interaction with the transnational economic order. This ensures that they do not compromise substance nor dilute basic human rights principles through language concessions and modifications in the process of negotiations with the international economic community. The Article concludes that, in order to protect a wide range of potential alternatives for the attainment of human dignity, individuals participating in this discourse must consciously aim to retain the powerful utopian ideas couched in human rights rhetoric.

## I. THE MARKET'S PLACE

### A. *Nothing Is Private: A Definition of International Economic Law*

This Article uses a broad definition of international economic law, which includes public international law, international business law, international trade law, private international law, and other categories that influence transnational economic activity and have the potential to impact the advancement and protection of human rights.<sup>8</sup>

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<sup>8</sup> A good example of this broad definition of international economic law is provided by Joel R. Paul:

In its broadest sense, international economic law includes all national and international legal norms that affect transnational movements of goods, services, capital and labor. The field may include subjects like international business transactions, private international law, international trade law, immigration law, European Communities law, comparative law, transnational litigation, international arbitration procedure, and aspects of banking, competition, employment, environmental, intellectual property, securities, tax, and telecommunications laws that regulate transnational transactions.

Joel R. Paul, *The New Movements in International Economic Law*, 10 AM. U.J. INT'L L. & POL'Y 607, 609 n.9 (1995). Similarly, the *Restatement (Third) of Foreign Relations Law* defines International Economic Law as "all the international law and international agreements governing economic transactions that cross state boundaries or otherwise have implications for more than one state, such as those involving movement of goods, funds, persons, intangibles, technology, vessels or aircraft." *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* Part VIII, Introductory Note at 261 (1987). There is continued debate, however, over which components of international law make up this term. Joel P. Trachtman describes this debate by delineating arguments for a distinction between international business law and international economic law. Under this view, international business law would remain

The idea that international law is divided into two distinct realms—private and public—is widely accepted though highly debated.<sup>9</sup> Public international law is traditionally referred to as the law governing relations between nation-states.<sup>10</sup> Public law, though, has commonly been defined as the law “dealing with the relations between private individuals and the government, and with the structure and operation of

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outside of the scope of public international law while international economic law would be included within it:

A related purported distinction between international business law and international economic law is the distinction between transactions and trade. Transactions, in this sense, are between private persons (or public persons treated more or less as private persons), while trade is a matter of public policy and mercantilism or protectionism. The distinction is one between levels of analysis. Analysis at the individual or firm level of economic organization is transactional, while analysis at the state or higher level is economic. Because the substantive body of law governing the individual is still predominantly domestic, this distinction implicates the domestic-international dichotomy.

Joel P. Trachtman, *Introduction: The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 38 (1996). These debates use the definition of economic law as a battleground for the debate over what economic activity should be included within the realms of public versus private international law. The disagreement reveals that in order to address all facets of economic activity, a definition of economic law similar to Joel Paul's and the *Restatement (Third) of Foreign Relations Law* is necessary since the definition Trachtman illustrates merely masks and reiterates the private/public distinction.

<sup>9</sup> See Bobbio, *supra* note 7, at 7, 15–17; Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349–57 (1982); Trachtman, *supra* note 8, at 34. For example, Joel Trachtman, in commenting on this debate, critiques the definition of private international law as follows:

I note the emptiness of the category “private international law.” Private international law is not separate from public international law. As many realists and critical legal theorists long ago pointed out, “private law” is an oxymoron. Rather, the important underlying issue is that there are at least two kinds of persons subject to law: private persons and states. The two types of applicable law may be quite different.

Trachtman, *supra* note 8, at 34. Another exception should be noted. The Secretariat of the United Nations Commission on Human Rights and the Subcommission for the Promotion and Protection of Human Rights (formerly the Subcommission for the Prevention of Discrimination and Protection of Minorities) asserts that all international law is public international law. This body insists that any legal instrument, private or public, that involves more than one state is a matter of public concern and is therefore a matter of public international law. Telephone Interview with Tamara Kunanayakam, Human Rights Commission Secretariat, United Nations, (Aug. 1996) (on file with author). Ms. Kunanayakam is currently directing the Working Group on Forced and Involuntary Disappearances under the auspices of the United Nations Office of the High Commissioner for Human Rights in Geneva, Switzerland.

<sup>10</sup> LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 45 (3d ed., 1993).

the government itself."<sup>11</sup> Private international law, on the other hand, refers to resolutions for conflicts of law and establishes the principle of comity for a country's domestic laws in foreign courts.<sup>12</sup> It is principally concerned with resolving conflicts of national law governing transactions between individuals, associations, and corporations from more than one domestic jurisdiction.<sup>13</sup>

Under a globalizing order that erodes national sovereignty and increases the importance of private actors, a clear delineation between private and public law and their relationship to one another is difficult to discern.<sup>14</sup> As such, the boundaries between public and private international law remain mutable. The increased role of cross-border transactions, trade, and production has given greater importance to the economic activities of private actors' parastatal activity.<sup>15</sup> As a result, an inclusive definition of international economic law is necessary to discuss the interaction between the international economic and international human rights regimes. Specifically, this inclusive definition allows for a consideration of all the points at which international human rights and international economic law interact. Adopting such a definition also permits a discussion of the impacts of transnational economic activity on universal observance of human rights without requiring a distinction between the public and the private.

### B. *Objects of Criticism and Locations for Negotiations: Economic Institutions and Transnational Corporations*

Incorporated within the definition of international economic law are the range of international economic instruments and institutions established at the end of World War II to facilitate a stable and globalized liberal economic order.<sup>16</sup> International agreements dominate this

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<sup>11</sup> BLACK'S LAW DICTIONARY 1244 (7th ed. 1999).

<sup>12</sup> "Justice Story coined the term, 'private international law,' to describe the principles governing conflicts which he derived from the law of nations." Paul, *supra* note 8, at 610.

<sup>13</sup> *Id.*; Trachtman, *supra* note 8, at 40.

<sup>14</sup> For example, in *Economic Order and International Law*, Wilhelm Ropke elaborated on what he called "[t]he converging interest of the science of international law and of economics in the connection between economic order and international law." Wilhelm Ropke, *Economic Order and International Law*, 86 RECUEIL DES COURS 203, 212 (1954).

<sup>15</sup> Paul, *supra* note 8, at 612-13.

<sup>16</sup> This range of instruments and institutions emerged from the United States' and British desire to stem the economic disorder that resulted from the departure of the pre-World War I gold standard-based monetary system, the ensuing nationalist economic policies, and the ill-effects of the Great Depression. HENKIN ET AL., *supra* note 10, at 1417-18.

area and generally cover broad tracts such as international trade, international monetary affairs, and international investment.<sup>17</sup> A skeletal overview of the primary participants in international economic law is essential for understanding the complexity of the debate that surrounds regulation of transnational economic activity. Transnational Corporations and the central international economic institutions are among the locations at which transnational activity has been and can continue to be influenced by human rights efforts, which demand that such economic activity incorporate the basic rights of people.

At the center of modern international economic legal history is the Bretton Woods-GATT system. Named after the 1944 conference held at Bretton Woods, New Hampshire,<sup>18</sup> this international economic system arose from the twin goals of stabilizing exchange rates in the post war period and ensuring the availability of the long-term capital necessary for post World War II reconstruction.<sup>19</sup> The Bretton Woods Conference developed the framework for the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (the World Bank), and sketched the General Agreement on Tariffs and Trade (GATT)-World Trade Organization (WTO) system.

Initial plans for both the World Bank and the IMF were focused on reconstruction rather than on development.<sup>20</sup> Advocates from less developed nations, however, pushed for a rapid transition from reconstruction to development. They feared that, instead of financing development in underdeveloped countries, institutions like the International Bank for Reconstruction and Development would merely supplement private investors.<sup>21</sup>

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<sup>17</sup> *Id.* at 1394.

<sup>18</sup> Some 730 people from forty-four countries—mostly allied nations—attended the conference. Victor L. Urquidi, *Reconstruction vs. Development: The IMF and the World Bank*, in *BRETTON WOODS*, *supra* note 28, at 13.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.* at 38–40.

<sup>21</sup> Victor L. Urquidi of Mexico, one such advocate, recalled a talk he gave at the Littauer School at Harvard University in 1944.

I began by reminding the audience that . . . Latin America . . . was well within the lowest category of income . . . per head in the world, productivity was low, and we showed every feature of underdevelopment. We needed to raise farm productivity and widen our domestic markets as a basis for industrialization, for which we required "investment for development purposes, better technique, and more education." I saw all this as an argument for obtaining foreign assistance. . . . I did not see private investment alone as doing the job, given the need for social reforms . . . . I feared that, unfortunately, the Bank



During the period from 1950 to the 1970s, the World Bank established the International Development Association (IDA), the International Finance Corporation (IFC), and the training-focused Development Institute.<sup>22</sup> In addition, the World Bank embarked upon research on various issues including agriculture, education, health, and urban growth.<sup>23</sup> The World Bank remained outwardly focused on the project of reconstruction throughout these early years. By the 1970s, however, the World Bank underwent an institutional shift towards development by expanding operations and giving substantial support to development programs and plans in a number of countries in Asia, Latin America, and Africa.<sup>24</sup>

During the first decade of the World Bank's institutional shift, the IMF remained closed to development issues, holding the position that it was established essentially for the purpose of reconstruction.<sup>25</sup> From 1979 to 1985, however, the IMF also underwent an institutional shift towards development. It became intensely involved in providing loans and designing programs to carry developing country members out of debt incurred from increases in oil prices and interest rates in the early and mid 1970s.<sup>26</sup> Presently, the IMF continues to act in a variety of capacities, including monitoring and controlling the economic management of a number of less developed nations.<sup>27</sup>

The current international trade law regime originated in conjunction with, though separate from, the Bretton Woods system. In the winter of 1947-1948, the United Nations Economic and Social Council (ECOSOC) organized the U.N. Conference on Trade and

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for Reconstruction and Development (I actually said that "one almost forgets to add this word") would place "too little emphasis on development" and that its operations "would be mostly to supplement private investors . . . instead of lending its own money," whereas we were "by no means sure of being able to resort to private capital on reasonable terms"; among other things, "investors . . . will be after profits, or lower corporation taxes, but [would not be] interested in our organic development or industrialization as a whole."

*Id.* at 43.

<sup>22</sup> *Id.*

<sup>23</sup> Urquidi, *supra* note 18, at 47.

<sup>24</sup> *Id.*

<sup>25</sup> The goals of the IMF are set out in Article I of its Articles of Agreement. Articles of Agreement of the International Monetary Fund, as amended, Apr. 1, 1978, 29 U.S.T. 2203, T.I.A.S. No. 8937.

<sup>26</sup> HENKIN ET AL., *supra* note 10, at 1419.

<sup>27</sup> Irving S. Friedman, *The International Monetary Fund: A Founder's Evaluation*, in *THE POLITICAL MORALITY OF THE INTERNATIONAL MONETARY FUND* 19 (Robert J. Meyers ed., 1987).

Employment in Havana, Cuba.<sup>28</sup> This conference originated in response to a number of proposals for a United Nations conference to negotiate an international trade charter and establish an International Trade Organization. By the spring of 1948, the conference participants established the GATT and a Charter for the International Trade Organization (ITO).<sup>29</sup> Though the ITO was never accepted by the United States and ultimately failed internationally, many of its provisions were incorporated into the GATT articles soon after the Havana Conference.<sup>30</sup> The historical ITO provisions later became the foundation for the World Trade Organization (WTO).<sup>31</sup>

In addition to the GATT, other major regional instruments promote the advancement of free trade agreements, either among their member nations or between member and non-member states. These instruments include the North American Free Trade Agreement (NAFTA),<sup>32</sup> the European Economic Community,<sup>33</sup> the African Economic Community,<sup>34</sup> the Latin American regional organizations,<sup>35</sup> the

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<sup>28</sup> HENKIN ET AL., *supra* note 10, at 1396; Simon Reisman, *The Birth of a World Trading System: ITO and GATT*, in *THE BRETTON WOODS-GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS* 83-85 (Orin Kirshner ed., 1996) [hereinafter BRETTON WOODS].

<sup>29</sup> Reisman, *supra* note 28, at 85.

<sup>30</sup> *Id.* at 85-86.

<sup>31</sup> *Id.* at 86.

<sup>32</sup> Henkin et al. describe the history of the NAFTA as follows:

In March, 1985, President Reagan and [Canadian] Prime Minister Mulroney asked their trade officials to explore ways to eliminate barriers to trade and investment between the United States and Canada. Under Congressionally granted "fast track" authority, negotiations began in 1986. The United States and Canada reached an agreement on the framework of a free trade area in 1987. And on January 1, 1989, the Canada-United States Free Trade Agreement came into effect. 27 I.L.M. 293 (1988) . . . . The favorable reception . . . moved the member states to open negotiations with Mexico with the aim of bringing about a North American Free Trade Agreement. These negotiations led to a signing of an agreement with Mexico at the end of 1992.

HENKIN ET AL., *supra* note 10, at 1547.

<sup>33</sup> For an overview of the history of the European Economic Community and a comparison between it and the NAFTA, see John P. Fitzpatrick, *The Future of the North American Free Trade Agreement: A Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe*, 19 HOUS. J. INT'L L. 1, 10-23 (1996).

<sup>34</sup> See generally Theophilus Fuseini Maranga, *The Colonial Legacy and the African Common Market: Problems and Challenges Facing the African Economic Community* 10 HARV. BLACK LETTER L. J. 105 (1993) (discussing the past and present challenges to the African Economic Community as a result of the lingering effects of colonialism).

<sup>35</sup> These include the Caribbean Community, the Andean Pact Organization, the Latin American Integration Association, and the Latin American Free Trade Association and MERCOSUR.

Association of South East Asian Nations (ASEAN),<sup>36</sup> and the proposed Arab Economic Union.<sup>37</sup> In addition, a large network of bilateral investment treaties complicate this regional system of economic agreements. These treaties include bilateral investment guarantee agreements; bilateral treaties of friendship, commerce, and navigation; and bilateral investment treaties for the encouragement and protection of foreign investment.<sup>38</sup>

Transnational corporations seek and enjoy the stability and protection provided by these economic institutions and agreements. Though largely unregulated by international law, transnational cor-

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<sup>36</sup> See generally Lim Siong Hoon, *Asean Takes First Step to Regional Customs Grouping*, FIN. TIMES (London), Oct. 9, 1991, at 3 (reporting that in October 1991, the member countries of the Association of South East Asian Nations (ASEAN) announced their creation of an Asian Free Trade Area, consisting of Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand, with the objective of creating a single market within 15 years); *Association of Southeast Asian Nations web site*, at <http://www.asean.org> (last visited Oct. 2, 2002) (offering up-to-date information about the status and progress of ASEAN negotiations and legal documents).

<sup>37</sup> *An International Conference to Study Arab Economic Union*, ARABICNEWS.COM, (November 20, 1997) ¶ 2, at <http://www.arabicnews.com/ansub/Daily/Day/971120/1997112024.html> (last visited Oct. 2, 2002); see also Mosad Zineldin, *Globalisation and Economic Integration Among Arab Countries*, ¶ 5, at <http://www.hf.uib.no/smi/pao/zineldin.html> (last visited Oct. 2, 2002).

<sup>38</sup> HENKIN ET AL., *supra* note 10, at 1394–95. By 1994 developed countries had negotiated over 500 bilateral investment treaties with developing countries. A.A. Fatouros, *Towards an International Agreement on Foreign Direct Investment*, in ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *TOWARDS MULTILATERAL INVESTMENT RULES* 50 (1996). Of the over 1,100 treaties listed in a 1999 publication by the World Bank Group's International Centre for Settlement of Investment Disputes, more than 800 had been concluded since 1987 and the list of countries party to such treaties had grown to 155. INT'L CENTRE FOR SETTLEMENT OF INV. DISPUTES, *Introduction to Bilateral Investment Treaties*, at <http://www.worldbank.org/icsid/treaties/intro.htm> (last visited Oct. 2, 2002). In May 1995, the complexity of this web of instruments led the Organization for Economic Co-operation and Development (OECD) to conduct negotiations among OECD member states for a Multilateral Agreement on Investment (MAI). The MAI's goal was to "provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures." . . . "After a three-year period of intense and highly contested negotiations, lasting until May 1998, and a six-month pause during which no official meetings on the MAI took place, negotiations ceased in December 1998." OECD FINANCIAL, FISCAL, AND ENTERPRISE AFFAIRS, *Multilateral Agreement on Investment: Documentation from the Negotiation*, at <http://www1.oecd.org/daf/mai/intro.htm> (last visited Sept. 28, 2002).

For a good introduction to the problem of developing a code of conduct for companies, see UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, *PRINCIPLES RELATING TO THE HUMAN RIGHTS CONDUCT OF COMPANIES*, U.N. Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/ (2000); see also HENKIN ET AL., *supra* note 10, at 96 (stating that general multinational treaties lay down rules of behavior that are of a "fundamentally norm-creating character" that form the basis for a general rule of law).

porations have become important players in the international economic system as foreign direct investment continues to increase rapidly and transnational corporations grow in number and size.

Added to the plethora of international institutions and entities that are potential objects of criticism and locations for negotiation are nation-states. The nation-state retains the power to regulate and deregulate the actions of people and corporate entities within its borders. Multinational agreements remain dependent on the approval of nations for legitimacy. If democratic, national governments also hold the burden of accountability to their citizens. As the purported representative of the people, a national government is an obvious recipient of criticism when it negotiates contracts with investors or treaties with foreign nations that are contrary to the well being of its populous.<sup>39</sup>

Given this complex consortium of economic actors, it is little wonder that it has been an arduous task to define the goals of regulating transnational economic activity to ensure that it does not violate the basic rights of people. The following section provides an historical overview of the attempts to ensure the observance of human rights by transnational economic actors.

## II. HUMAN RIGHTS AND INTERNATIONAL ECONOMIC LAW: ENCOUNTERS

The negotiations between the human rights community and its international economic counterparts have been in progress, in differing degrees and with diverging levels of success, for over thirty years. To illustrate the importance of the language developing from those negotiations, Part II first discusses the role of nongovernmental organizations in the interactions between the human rights community and the international economic community. Section B then traces the developments of the negotiations between the human rights community and TNCs by means of various codes of conduct. Last, Section C outlines the general trend of the major international financial institutions towards acknowledging, at least in part, the influence and im-

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<sup>39</sup> The debate surrounding NAFTA is a good example of opposition to an international trade treaty from large portions of a population. See, e.g., Harry Browne, *Green Groups, Maturing Relationships*, 5 BORDERLINES 31, ¶ 1, available at <http://www.us-mex.org/borderlines/1997/bl31/bl31gren.html> (last visited Nov. 10, 2002). For example, there has been Canadian opposition to NAFTA. See Iryll Umel, *Capital Watch: NAFTA's Drain on Canadian Sovereignty*, WASHINGTON REPORT ON THE HEMISPHERE ¶ 5 (Aug. 6, 2001) at [http://www.coha.org/WRH\\_issues/21.14-CW-Nafta.htm](http://www.coha.org/WRH_issues/21.14-CW-Nafta.htm) (last visited Nov. 10, 2002).

pact of their institutions on the protection and promotion of the ideas encompassed by international human rights.

A. *The Voice of Human Rights: The Role of Nongovernmental Organizations*

Nongovernmental organizations (NGOs) are prominent and essential actors in the efforts to ensure the accountability of transnational economic activity. These groups actively, and at times noisily, link this economic activity with the observance of human rights. Together with the United Nations and the ILO, they are the primary advocates and protectors of human rights law and ideas. NGOs have contributed tremendously to efforts to draw the attention of international economic actors to the compelling nature of human rights and their integral importance in long-term, sustainable development. In consulting and negotiating with their economic counterparts, however, it is essential that NGOs remain attentive at all times to the specific substantive and linguistic concessions they agree to make with economic actors.

Traditionally, NGOs play a gadfly role by calling attention to abusive labor practices,<sup>40</sup> environmental offenses,<sup>41</sup> and the marketing of products that are known health-hazards.<sup>42</sup> Until the late 1990s, however, human rights NGOs had done little to highlight the need to precondition the expansion of transnational economic activity with both corporate observance of basic human rights and a commitment by all countries active in the global economy to improve their human rights records. The 1997 Human Rights Watch World Report was the first indication that Human Rights Watch acknowledged transnational economic activity as a threat to human rights.<sup>43</sup> In its 1998 report,

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<sup>40</sup> See, e.g., AMNESTY INTERNATIONAL USA, LATIN AMERICA: HUMAN RIGHTS VIOLATIONS AGAINST TRADE UNIONISTS 1-5 (1991); AMNESTY INTERNATIONAL USA, PHILIPPINES: HUMAN RIGHTS VIOLATIONS AND THE LABOUR MOVEMENT 1-3 (1991).

<sup>41</sup> See, e.g., *Aguinda v. Texaco, Inc.*, No. 01-7756L, 2002 U.S. App. LEXIS 16540, at \*1 (2d Cir. Aug. 16, 2002). See discussion *infra* note 88.

<sup>42</sup> See generally LAWYERS COMM. FOR HUMAN RIGHTS & NAT'L RES. DEF. COUNCIL, WORKING PAPER: AN INT'L FRAMEWORK FOR ADDRESSING THE PROBLEMS POSED BY INT'L TRADE IN BANNED OR SEVERELY RESTRICTED PROD. (1983) (arguing that importing nations must give informed consent before they allow banned or severely restricted products to enter their territory and concluding that the United Nations must establish a framework that would allow every nation to protect its citizenry by mandating such informed consent regulations).

<sup>43</sup> HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1997: EVENTS OF 1996, at 356-61 (1996) (including an overview of 1996 activist efforts to encourage corporations to observe labor rights, environmental rights, rights of association and providing cursory information on the role of governments in balancing the promotion of human

Human Rights Watch noted the emerging importance of NGO activity in promoting corporate practices that comply with universal human rights standards.<sup>44</sup> By 2001, Human Rights Watch had created a department on Corporations and Human Rights, included a section on Business and Human Rights in its annual report, and employed full time staff on this issue.<sup>45</sup>

Another NGO, the Lawyer's Committee for Human Rights, first began to focus on the relationship between international financial institutions and the advancement of human rights in 1993.<sup>46</sup> Differing from many other NGOs, which targeted transnational corporations, the Lawyers Committee focused on the responsibility of the World Bank in the promotion of human rights.<sup>47</sup> Partially as a result of this work and the work of other NGOs surrounding the activity of multi-lateral economic institutions, the World Bank now considers how the projects it funds will effect human rights.<sup>48</sup>

The proliferation of NGO activity on the issue of human rights and trade or human rights and business is impressive. As general familiarity with this issue has spread and deepened, so the NGOs working on this issue have mirrored that growth. The challenge ahead is to ensure that these groups, while advocating for inclusion of human rights concerns, maintain the strong language of rights within their institutional rhetoric.

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rights with the desire to attract capital investment). Notably this human rights issue, which just the year before had been relegated to the back of this organization's annual report, appeared near the front of its 1998 report. In the 1998 report, "Multinational Corporations" appeared as the third campaign issue after landmines and the establishment of an International Criminal Court. *See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1998: EVENTS OF 1997*, at 415-22 (1997) [hereinafter *WORLD REPORT 1998*] (listing "Corporations and Human Rights" as the second special issue after "Prisons").

<sup>44</sup> *Id.*

<sup>45</sup> *See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2002: EVENTS OF 2001*, at 564-73 (2002) [hereinafter *WORLD REPORT 2002*].

<sup>46</sup> Their first publication on this matter was *THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE WORLD BANK: GOVERNANCE AND HUMAN RIGHTS* (1993).

<sup>47</sup> *LAWYERS COMM. FOR HUMAN RIGHTS, IN THE NAME OF DEVELOPMENT: HUMAN RIGHTS AND THE WORLD BANK IN INDONESIA, A JOINT REPORT OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE INSTITUTE FOR POLICY RESEARCH AND ADVOCACY 1* (1995) [hereinafter *IN THE NAME OF DEVELOPMENT*]. Subsequent reports of the Lawyer's Committee for Human Rights are also committed to this goal.

<sup>48</sup> Attention from the World Bank and other international financial institutions to human rights will be discussed in Part II, Section C.

*B. Regulating Business Conduct in the Global Economic System:  
Codes of Conduct*

Nongovernmental organizations have had varying degrees of success in interacting with the range of international economic actors discussed herein. NGOs, together with the United Nations, the ILO, and individual governments, have found codes of conduct to be a successful means to influence the activities of TNCs. This section details the differing types of codes of conduct, each with their own set of methods and goals, and each with their own potential for effective inclusion of human rights within corporations' daily activities. Almost all codes of conduct remain entirely voluntary and lack enforcement mechanisms. This, among other reasons, may explain the ready incorporation of the optimistic language of human rights by many TNCs. Nonetheless, they provide a model for maintaining human rights language at other points of contact between the human rights community and its economic counterparts.

1. International Institutional Initiatives to Promulgate Codes

In response to the mobilization efforts of human rights NGOs, the United Nations and its individual members have focused on regulating the behavior of non-state actors.<sup>49</sup> Private corporations, particularly TNCs, are included within this focus, as they are "some of the most significant non-state actors in the world today."<sup>50</sup> As a result, the United Nations (U.N.) and other inter-governmental bodies advocate developing transnational codes of conduct for TNCs.<sup>51</sup>

The United Nations' attempts to create a code of conduct for TNCs are varied and numerous. In 1990 the United Nations Centre on Transnational Corporations issued a Draft Code of Conduct for TNCs.<sup>52</sup> Although the Commission on Transnational Corporations

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<sup>49</sup> Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 158 (1997).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Draft United Nations Code of Conduct on Transnational Corporations*, U.N. Center on Transnational Corporations, Special Sess. (Mar. 7-18, 1983 and May 9-20, 1983), U.N. Doc. E/C.10/1982/6 (1986) [hereinafter *Draft Code*]; *Draft United Nations Code of Conduct on Transnational Corporations*, U.N. ESCOR, Comm. Transnational Corporations, Special Sess. (June 11-29, 1984), U.N. Doc. E/C.10/1984/s/5 (1984). The mandate to issue this Code of Conduct for Transnational Corporations was prompted by three factors. First, international economic law scholars held that host countries should abide by certain standards concerning treatment of foreign investors. They believed such standards should be enforced at the international level. Second, a widespread demand for some sort of interna-

agreed on the Draft Code of Conduct, the U.N. member states were unable to agree on key provisions "dealing with protection of property and contractual rights, compensation in case of taking property, and the settlement of disputes."<sup>53</sup> Consequently, the Draft Code of Conduct was abandoned.<sup>54</sup> In 1996 the United Nations Human Rights Commission established a Working Group on the Right to Development that re-initiated U.N. activity aimed at establishing a framework to hold accountable TNCs that violate human rights standards.<sup>55</sup>

In 1998 the Subcommission for Prevention of Discrimination and Protection of Minorities (now the Subcommission for the Promotion and Protection of Human Rights) established the Sessional Working Group on the Working Methods and Activities of Transnational Cor-

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tional standards of behavior emerged from both concerns that TNCs were interfering with the traditional social and cultural objectives of their host countries and evidence of corporate misconduct, corruption, and interference in internal state matters. Third, rights advocates and international economic actors alike believed a Code of Conduct was necessary in order to assure uniformity, predictability, and accountability. *Outstanding Issues in the Draft Code of Conduct on Transnational Corporations*, U.N. ESCOR, Commission on Transnational Corporations, Special Sess. (June 17–21, 1985), at 6–7, U.N. Doc. E/C.10/1985/s/2 (1985).

<sup>53</sup> Gillian White, *The New International Economic Order: Principles and Terms*, in INTERNATIONAL ECONOMIC LAW AND DEVELOPING STATES 48–49 (Hazel Fox ed., 1992) [hereinafter DEVELOPING STATES].

<sup>54</sup> There is general consensus that there will not be further negotiations on the *Draft Code*. See *id.* at 49; HENKIN ET AL., *supra* note 10, at 1458. In fact, the Centre on Transnational Corporations no longer exists as an autonomous entity and has been made one part of the Transnational Corporations and Management Division of the Division of Economic and Social Development of ECOSOC. During the period in which the Centre on Transnational Corporations drafted the Code of Conduct, it had been an autonomous body within the U.N. Secretariat. HENKIN ET AL., *supra* note 10, at 1454, 1458–59. Importantly, the Commission agreed on draft provisions on the recognition of state sovereignty, adherence to the cultural and economic imperatives of the host country, and respect for human rights and fundamental freedoms. *Draft Code*, *supra* note 52, ¶¶ 6, 9, 12, 13.

<sup>55</sup> This intergovernmental working group of experts had a two-year mandate for its work. In 1998, under Commission on Human Rights Resolution 1998/72, the Commission on Human Rights established an open-ended Working Group on the Right to Development to "monitor and review progress made in the promotion and implementation of the right to development as elaborated in the Declaration on the Right to Development." *The Right to Development*, U.N. High Comm. Hum. Rts., Comm. Hum. Rts. Res. 1998/72, ESCOR, Supp. No. 3, at 229, U.N. Doc. E/CN.4/RES./1998/72 (1998). Numerous statements of this body argue that the current concentration of economic and political power in transnational corporations stands as an obstacle to the realization of the right to development and to achieving equity in resource and income allocation. *Declaration on the Right to Development*, G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/RES/41/128 (1986); *Report of the Working Group on the Right to Development on Its Second Session*, U.N. ESCOR, Comm. Hum. Rts., 51st Sess., ¶ 59, U.N. Doc. E/CN.4/1995/11; *Report of the Working Group on the Right to Development on Its First Session*, U.N. ESCOR, Comm. Hum. Rts., 50th Sess., ¶ 91, U.N. Doc. E/CN.4/1994/21.



porations with the intention of evaluating the propriety of adopting a code of conduct for TNCs.<sup>56</sup> The Working Group's draft principles on the conduct of corporations provide a basis for assessing corporations' performance and have the potential to result in either a new U.N. standard or global guidelines for the conduct of corporations.<sup>57</sup> In August 2002, the mandate of this Working Group was extended until 2004, a clear indication of the Subcommission's continued interest in the interaction between human rights and international corporate activity.

In 2000 the Secretary-General of the United Nations, Kofi Anan, announced the creation of the highly publicized Global Compact, an initiative launched with the aim of encouraging corporations to voluntarily adopt nine fundamental principles on human rights, labor, and environmental protections.<sup>58</sup> The Global Compact directly appeals to private corporations to adopt and adhere to principles that are already widely accepted by U.N. member states, via the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, and the 1992 Rio Declaration of the United Nations Conference on Environment and Development.<sup>59</sup>

The U.N. is not the only international institution to attempt to adopt codes of conduct for TNCs. In 1976 the Organization for Eco-

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<sup>56</sup> *The Relationship Between the Enjoyment of Economic, Social, and Cultural Rights and the Right to Development, and the Working Methods of Transnational Corporations*, U.N. High Comm. Hum. Rts., Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1998/8, U.N. Doc. E/CN.4/Sub.2/RES/1998/8 (1998).

<sup>57</sup> *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on its Fourth Session*, U.N. ESCOR, Comm. Hum. Rts., Sub-Commission on the Promotion and Protection of Human Rights, 54th Sess., U.N. Doc. E/CN.4/Sub.2/2002/13 (2002); WORLD REPORT 2002, *supra* note 45, at 571.

<sup>58</sup> Secretary-General Proposes Global Compact on Human Rights, Labor, Environment in Address to World Economic Forum in Davos, U.N. Doc. SG/SM/6881/Rev.1\* (1990) *available at* <http://www.un.org/partners/business/davos.htm> (last visited Oct. 2, 2002). Most interesting about the Global Compact is the Secretary-General's suggestion to the private actors that they have the power to encourage sovereign states over which they have influence to adhere to the principles of the Global Compact. He also encourages these private actors to behave in accordance with the Global Compact, even in locations that may not afford these protections to their own people. *Id.*

<sup>59</sup> See The Global Compact, *Overview*, *available at* <http://www.unglobalcompact.org/Portal/> (last visited Nov. 8, 2002). The overview states that the Global Compact is "based on nine principles in the areas of human rights, labour, and the environment." These principles are "derived from universal consensus based on" the Universal Declaration of Human Rights, The International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work, and The Rio Declaration on Environment and Development.

nomic Co-operation and Development (OECD) member states adopted a Declaration on International Investment and Multinational Enterprises.<sup>60</sup> When the Guidelines were adopted in 1976, they represented the first international agreement on multinational enterprises accepted by both business and labor representatives of the OECD member states. As such, they represent an innovative approach to encouraging responsible behavior from multinational enterprises.<sup>61</sup>

Likewise, the International Labor Organization adopted a code of conduct for TNCs.<sup>62</sup> Entitled "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy," the tripartite ILO system requires that the Conference delegation from each state party be comprised of two governed representatives, one labor

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<sup>60</sup> OECD, *Declaration on International Investment and Multinational Enterprises*, in THE OECD DECLARATION AND DECISIONS ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: BASIC TEXTS, 5-6 (Nov. 8, 2000), available at [http://www.oalis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c1256991003b5147/\\$FILE/00085743.PDF](http://www.oalis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c1256991003b5147/$FILE/00085743.PDF) (last visited Oct. 2, 2002). [hereinafter OECD DECLARATION]. In Annex 1 to that document the member states also adopted Guidelines for Multinational Enterprises. OECD, *The OECD Guidelines for Multinational Enterprises*, in OECD DECLARATION *supra*, at 7-10 [hereinafter *OECD Guidelines*]. These Guidelines "aim to ensure that the operations of [multinational] enterprises are in harmony with government policies to strengthen the basis of mutual confidence between enterprises and the societies in which they operate . . . ." *Id.* at 7. The Guidelines include provisions on "Employment and Industrial Relations" and "Environment." *Id.* at 13-16.

<sup>61</sup> At least one proponent of codes, guidelines, and declarations argues that these non-binding instruments can influence the behavior of governments and enterprises. See William C. Fredrick, *The Moral Authority of Transnational Corporate Codes*, 10 J. OF BUS. ETHICS, 165, 167 (1991). It is arguable that the Guidelines provide a valuable reference for future endeavors of the United Nations Centre on Transnational Corporations and the efforts of the International Labour Organization (ILO) to draft similar documents. (The ILO document will be discussed below.) The Guidelines are largely ineffectual, however. First, upon learning that the environmental provisions of the Guidelines were adopted in 1991, one may optimistically argue that such a recent addition to the Guidelines indicates that they could be modified again to include provisions ensuring that international human rights standards are observed by multinational enterprises. *OECD Guidelines, supra* note 60. Although the guidelines were recently clarified, they are unlikely be modified in the near future. Second, the Guidelines are voluntary, and there is no indication that OECD member-states intend to make corporate or investor adherence to the Guidelines a precondition of operating within their territory. In fact, this would probably be an express violation of current Guideline provisions, which are explicitly intended to be voluntary. *Id.* at 7. Finally, a 1991 decision of the OECD Council clarifies that, in addition to being voluntary, the Guidelines are non-enforceable, even against enterprises that commit to observing them. *Id.* at 33-34.

<sup>62</sup> Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy was adopted by the ILO on November 16, 1977, at the 204th Session of the ILO in Geneva. *International Labor Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 17 I.L.M. 422 (Nov. 16, 1977).

representative, and one representative from the business sector.<sup>63</sup> Though each government chooses its representatives in consultation with the country's business community, the employer and the labor representatives are theoretically free to take positions that do not conform to their government's policy objectives.<sup>64</sup>

## 2. National Campaigns to Establish Codes of Conduct: The Model of the United States

National governments also encourage codes of conduct. The United States government, for example, now encourages United States-based corporations to adopt codes of conduct to regulate their own activity when they establish operations in foreign countries or contract with foreign suppliers and producers.<sup>65</sup> These types of codes aim to regulate corporate activity, as opposed to codes that aim to influence the human rights practices of the countries where TNCs are active. Codes that aim to influence corporations' human rights practices propose that businesses interested in countries with poor human rights records have a responsibility to act as agents for the protection and promotion of human rights in the course of their conduct.<sup>66</sup> This type of proposal has emerged as the countries that once advocated for transnational corporate accountability have become increasingly convinced that development is their primary priority.

In an atmosphere in which countries view themselves in competition for capital activity,<sup>67</sup> many in the human rights community have

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<sup>63</sup> Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 778 n.74.

<sup>64</sup> *Id.*

<sup>65</sup> Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution*, 19 FORDHAM INT'L L.J. 1963, 1974 (1996). For example, in 1996 the United States Department of Commerce issued Model Business Principles. In addition, other campaigns for codes of conduct include the No Sweat Campaign launched in 1996 by U.S. Labor Secretary Robert Reich; the "Trendsetter" list started by the Labor Department to encourage retailers to demonstrate a commitment to U.S. labor laws; and the Apparel Industry Partnership, which was also facilitated by the Labor Department. Deborah L. Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, 77 FOREIGN AFFAIRS 7, 7-8 (Mar./Apr. 1998).

<sup>66</sup> Business leaders who reject suggestions that they should be human rights reformers usually defend their positions by insisting that democracy and human rights are promoted by free trade rather than regulation of corporate conduct. See Frey, *supra* note 49, at n.13.

<sup>67</sup> ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 38, at 9. But see PAUL KRUGMAN, *POP INTERNATIONALISM* 6 (1997). Krugman argues that the belief that one country must compete with all the others as though in a global marketplace in order to attract foreign direct investment is flawed. He states:

begun arguing that TNCs should act as advocates for human rights in the host countries in which they operate.<sup>68</sup> It may be possible for the United States to prohibit corporations from violating human rights or locating in countries that violate human rights in accordance with the *Restatement (Third) of the Foreign Relations Law of the United States*, § 414 comment c.<sup>69</sup> According to the *Restatement*, subject to certain restrictions, “a state has jurisdiction to prescribe law with respect to . . . (1)(c) conduct outside its territory that has or is intended to have substantial effect within its territory, [and] (2) the activities, interests, status, or relations of its nationals outside as well as within its territory,”<sup>70</sup> except where such jurisdiction is unreasonable.<sup>71</sup> More specifically, the *Restatement* explains that a State may prescribe its laws extraterritorially “for limited purposes with respect to activities of foreign branches of corporations organized under its laws.”<sup>72</sup>

A comment to the *Restatement* seeks to limit permissible extraterritorial regulation by stating that, as a general matter, such laws may not be prescribed extraterritorially if they will apply to “predominately local activities, such as industrial and labor relations, health and safety practices, or conduct related to preservation or control of the local environment.”<sup>73</sup> This comment appears to prohibit extraterritorial application of laws on a wide range of human rights matters. One commentator has noted, however, that although bribery—the subject of the Foreign Corrupt Practices Act—may be classified as a local activity, “the United States’ criminalization of bribery abroad may be distinguished from the activities listed in Comment c of the *Third Restatement* by the fact that bribery is a simple negative proscription (‘do not bribe’), whereas the other activities involve extensive positive

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In fact, however, trying to define the competitiveness of a nation is much more problematic than defining that of a corporation. The bottom line for a corporation is literally the bottom line . . . . Countries, on the other hand, do not go out of business. They may be happy or unhappy with their economic performance, but they have no well-defined bottom line. As a result, the concept of national competitiveness is elusive.

*Id.*

<sup>68</sup> See, e.g., Cassel, *supra* note 65.

<sup>69</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1), (2) (1987).

<sup>70</sup> According to the *Restatement*, a TNC is considered a national of the state under whose law it is organized or incorporated. *Id.* at cmt. e.

<sup>71</sup> *Id.* at § 403(1).

<sup>72</sup> *Id.* at § 414(1).

<sup>73</sup> *Id.* at cmt. c.

regulations."<sup>74</sup> Therefore if negative proscriptions are permissible, a law could be enacted which simply prohibits corporations from violating basic human rights or locating in countries that violate the human rights treaties of that corporation's home state.

The United States government has often used its ability to regulate transnational economic activity as a method of encouraging foreign governments to comply with basic human rights standards. Another method employed by the United States and other nations is the use of economic sanctions and embargoes against countries that have fallen into disfavor with the U.S.<sup>75</sup> The most successful and well-known example is the United States embargo on trade with and investment in South Africa during the final years of apartheid in that country.<sup>76</sup> U.S. use of economic embargoes, however, has recently become unpopular as a result of multilateral economic treaties that prohibit such sanctions.<sup>77</sup>

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<sup>74</sup> Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 280 n.98 (1997).

<sup>75</sup> Frey states:

Economic sanctions are a tool used to punish offending governments; these sanctions have a direct impact on TNCs doing or seeking to do business in these countries. The U.S. Government has sought to extend its influence even further in the cases of Cuba, Iran, and Libya, by adopting legislation that would penalize non-U.S. businesses that have certain types of investments in these rogue states.

Frey, *supra* note 49, at 168–69 (citations omitted).

<sup>76</sup> Daniel Schorr, *What the World Thinks of 'the Embargo'*, THE CHRISTIAN SCIENCE MONITOR, Jan. 23, 1998, at <http://www.csmonitor.com/durable/1998/01/23/opin/column.1.html> (last visited Nov. 8, 2002).

<sup>77</sup> The GATT/WTO system asserts equal treatment of investors and countries in like circumstances through Most Favored Nation (MFN) status as one of its fundamental principles. The Most Favored Nation provision of the draft documents for the Multilateral Agreement on Investments (MAI) provides one historical example of the international move to eliminate economic embargoes. OECD, *The Multilateral Agreement on Investment (Report by the Chairman to the Negotiating Group)*, Annex 3 art. 2, 13–14 (May 1998), available at <http://www1.oecd.org/daf/mai/pdf/ng/ng9817e.pdf> (last visited Oct. 6, 2002). According to this provision, once a country grants a certain level of treatment to a foreign investor or a foreign investment from a particular country, it cannot then grant less favorable treatment to any other investment or investor. This principle of the MAI also would have required equal treatment among all target countries.

The Most Favored Nation provision of the MAI provides a valuable example of a general decline in the use of economic or trade sanctions to discourage governments from engaging in abusive practices. For a concise discussion of the decline of MFN status and the rise of Normal Trade Relations status, see, for example, INTERNATIONAL TRADE DATA SYSTEM, NORMAL TRADE RELATIONS (FORMERLY KNOWN AS MOST FAVORED-NATION STATUS (MFN)), at [www.itds.treas.gov/mfn.html](http://www.itds.treas.gov/mfn.html) (last updated Mar. 12, 2002). This would prevent

### 3. Private Initiatives to Establish Voluntary Codes of Conduct

Corporations themselves, under pressure from consumer boycotts, have voluntarily developed and adopted codes of conduct.<sup>78</sup> There is some evidence that this is a successful strategy for ensuring corporate adherence to human rights standards. For example, as a result of public pressure, boycotts, or picketing, many large and well-known corporations such as the Gap, Starbucks Coffee, and Reebok have committed to much-improved labor standards and have agreed to monitor the labor practices of their sourcing locations.<sup>79</sup>

Nonetheless, consumer boycott strategies are an inefficient method to achieve high levels of human rights observance. Consumer boycotts are only likely to be successful against brand name products that are both well known and conveniently replaceable by consumers. The voluntary codes of conduct system assumes the brand-driven market functions in such a manner that a consumer is actually willing and able to replace a favorite brand by one that has not been cited for human rights violations. Even promoters of the voluntary codes of conduct system admit that observance of human rights issues "is not fully decisive in the marketplace."<sup>80</sup> Additionally, these strategies depend on access to full and accurate information on corporate activity that is often extremely difficult to discern.<sup>81</sup>

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governments from distinguishing between foreign investors or foreign investment targets based on countries' human rights practices, labor treatment, or other criteria. It should be noted that by denying member states the ability to use economic sanctions and embargoes against nations that violate human rights, a valuable method of enforcing human rights may be eliminated. See HARVARD HUMAN RIGHTS PROGRAM, *THE MULTILATERAL AGREEMENT ON INVESTMENT: A THREAT TO INTERNATIONAL HUMAN RIGHTS PROTECTION MECHANISMS* (1998) (on file with author) (outlining the human rights norms that would have been violated if the MAI had passed). Though not discussed at length herein, a recent article by Barbara Frey provides a comprehensive overview of United States domestic actions on regulating its own corporations that extend their business to foreign countries. See Frey, *supra* note 49, at 168–73. These efforts include the codes of conduct initiated at the federal level which have already been mentioned in this Article, as well as legislative initiatives to regulate the economic activity of transnational enterprises and regulate the involvement of United States' corporations in the political affairs of foreign nations. *Id.*

<sup>78</sup> Examples include Social Accountability International's Social Accountability 8000 campaign, which aims to encourage firms to adhere to a predetermined set of labor and human rights standards by providing them with certification as a SA8000 company if their manufacturers pass inspection. SOCIAL ACCOUNTABILITY INT'L, AN OVERVIEW OF SAI AND SA8000, at <http://www.cepaa.org/introduction.htm> (last visited Oct. 6, 2002). The success of this effort clearly depends on consumer awareness and activism.

<sup>79</sup> See Spar, *supra* note 65, at 9–10.

<sup>80</sup> *Id.* at 9.

<sup>81</sup> For example, after the Nike Corporation adopted its Code of Conduct, it disappeared from the light of public scrutiny. However, the CEO of Nike has revealed that de-

Further, it is misleading to assert that these codes of conduct are likely to reverse current exploitative trends and actually create a "race to the top."<sup>82</sup> Although pressuring corporations to observe basic human rights standards may improve corporate observance of human rights above the deplorable level which inspires consumer boycotts, this is a much more modest advance than what one might imagine a true race to the top would achieve.

Distinguished from codes of conduct regulating the corporation's own human rights practices are codes aiming to influence the human rights records of the countries in which a corporation operates.<sup>83</sup> In the first scenario, the best advocacy strategy may be to promote improvement of the domestic laws regulating corporate activity. The international codes mentioned above and the idea of Most Favored Nation status prohibit differential treatment under the domestic law of any given country between foreign and domestic companies. This contributes greatly to what has become known as the "race to the bottom." Business enterprises may not be breaking domestic law when

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spite Nike's adoption of a Code of Conduct, which purportedly regulates labor practices of all their foreign subsidiaries and producers, the company does not adhere to those practices. *THE BIG ONE* (Miramax Pictures 1997). In addition, workers who produce Nike products in Jakarta are entirely unaware that Nike has promulgated a Code of Conduct and certainly have neither means of reporting accurately and efficiently on Nike's adherence to this code, nor means to enforce it. *Id.*; see also *What Would You Do If You and Seven Other Workers at Your Factory Lost Fingers in Dangerous Machinery Because the Factory Owner Couldn't Be Bothered to Fix It? Haryanto's Story* (Jan. 2000), at <http://www.caa.org.au/campaigns/nike/haryanto.html> (last visited Nov. 9, 2002).

<sup>82</sup> See Spar, *supra* note 65, at 9-10. In this context, the race to the top suggests that companies, in seeking consumer approval and loyalty, compete or race against one another to protect and promote labor and human rights conditions for their workers or the environmental conditions in the regions where they work.

<sup>83</sup> In 1990, in response to Chinese human rights abuses, Reebok announced the following principles:

1. Reebok will not operate under martial law conditions or allow any military presence on its premises.
2. Reebok encourages free association and assembly among its employees.
3. Reebok will seek to ensure that opportunities for advancement are based on initiative, leadership and contributions to the business, not political beliefs. Further, no one is to be dismissed from working at its factories for political views or non-violent involvement.
4. Reebok will seek to prevent compulsory political indoctrination programs from taking place on its premises.
5. Reebok reaffirms that it deplores the use of force against human rights.

Frey, *supra* note 49, at 180 n.140 (quoting Diane Orentlicher & Timothy Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 108 (1993)) (citing Reebok Code of Conduct).

they benefit from a country's legal structure that is geared towards maximizing profits but does not provide adequate environmental, health, or labor protections. These enterprises often operate, however, in violation of the rights enumerated in the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social, and Cultural Rights.<sup>84</sup> As a law-abiding entity in a country that itself has not become a state party to the Covenants or is not fulfilling its obligations under these Covenants, such a corporation is shielded from accountability as long as it can prove that it did not make any of the key decisions to violate human rights in a country that has incorporated human rights laws into its domestic legislation.<sup>85</sup> At the same time, as long as the U.N. Subcommittee for the Promotion and Protection of Human Rights and the U.N. Human Rights Commission are reluctant to hold nations accountable for failing to prosecute corporations that violate human rights, the likelihood that these violations will escape international scrutiny remains high.

Alternatively, a law could mandate that corporations, in the course of conducting their activities abroad, provide the same level of protection to human rights, such as labor and environmental rights, as mandated in their home countries.<sup>86</sup> Such laws might persuade the

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<sup>84</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>85</sup> See, e.g., *Aguinda v. Texaco, Inc.*, No. 01-7756L, 2002 U.S. App. LEXIS 16540, at \*10 (2d Cir. Aug. 16, 2002). The plaintiffs in this case, seeking relief based on Texaco's alleged environmental abuse in Ecuador, filed suit in part under the Alien Tort Claims Act (ACTA), 28 U.S.C. § 1350 (1789), asserting that Texaco's actions violated international law. *Id.* The plaintiff's legal team convinced the court that if it could prove that Texaco's decision to pursue environmental degradation in Ecuador that, if conducted in the United States would violate U.S. environmental law, Texaco could not use the procedural defense of forum non conveniens to block the litigation against it. *Id.* In 2001, after six years of rehearings and remands, the district court dismissed these actions based on forum non conveniens, holding that litigation should proceed in Ecuador. *Aguinda v. Texaco*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd as modified*, 2002 U.S. App. LEXIS 16540 (2d Cir. 2002). In conducting its forum non conveniens analysis, the district court concluded that plaintiffs would be unlikely to demonstrate that Texaco's acts were intentional torts actionable under the ATCA. *Id.* at 544. For further information on this and other cases filed under the ATCA, see <http://www.earthrights.org/litigation/index.html> (last updated May 28, 2002).

<sup>86</sup> For a proposal to extend all relevant U.S. environmental regulations to TNC operations abroad, see Alan Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 *ECOLOGY L.Q.* 477 (1990); see also Mitchell F. Crusto, *All That Glitters*



domestic corporations of a given country to improve their standards. First, once TNCs are prevented from increasing profits by capitalizing on human rights abuses, host-country domestic corporations—that currently escape scrutiny—may become the targets of a consumer boycott strategy. By analogy, the internationalization of the United States Foreign Corrupt Practices Act<sup>87</sup> suggests that if countries impose obligations on their own corporations doing business abroad, there could be a tendency to universalize the legal norm so as to reduce any competitive advantage of corporations not yet constrained by such laws. In this instance it must be noted that, in large part, the countries with the most powerful corporate interests carry tremendous influence in the realm of international law and policy.

Mandating corporations to provide the same level of protection to human rights as in their home countries could, however, place western corporations at a disadvantage in the global market by allowing corporations originating in nations without human rights protections to exploit their labor sources. Western corporations, however, saddled with the protective laws of their home states, would be prohibited from capitalizing in this way.<sup>88</sup> The predictable result would be a massive shift in location of original legal incorporation away from developed nations into the jurisdictions with the lowest levels of human rights protection. This, in turn, would result in a rapid elimination of protective laws in the countries that currently do protect human rights in an attempt to encourage corporate headquarters to repatriate.<sup>89</sup> Hence, another race to the bottom.<sup>90</sup>

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*Is Not Gold: Congressionally-Driven Global Environmental Policy*, 11 GEO. INT'L ENVTL. L. REV. 499, 519–29 (1999).

<sup>87</sup> Foreign Corrupt Practices Act, 15 U.S.C. § 78dd–1 (1994). See generally *A Blow Against Bribery: Michael Hershman on the OECD Campaign over Corruption*, FIN. TIMES (London), Feb. 23, 1998, at 14.

<sup>88</sup> Spar notes that it is difficult for competing companies to insist on superior labor standards or pay higher wages due to the force of the market: “if one firm pays the higher wage or refuses to do business with an exploitative low-cost sub-contractor, it risks losing market share to more callous competitors.” Spar, *supra* note 65, at 10.

<sup>89</sup> This argument is perhaps most popularly known as the “giant sucking sound” that Ross Perot, 1992 and 1996 presidential candidate, predicted the United States would hear after NAFTA was signed. See, e.g., Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 A.J.I.L. 268, 298 (1997).

<sup>90</sup> As a means for addressing this issue, Human Rights Watch and others have recently modified their activities around the issue of TNCs to include the activities of all businesses, thereby eliminating the protest on the part of TNCs that they would have to behave under one standard while domestic businesses would have the competitive advantage of less stringent human rights and environmental standards.

There are flaws, however, in this race to the bottom argument. First, there are a number of cost advantages and profit motives that influence corporations to establish subsidiaries or to enter into production contracts with foreign governments or corporations. Certainly, wage laws and labor regulations are among these considerations, but they are not alone. For example, the potential to access new foreign domestic markets and favorable tax laws of foreign jurisdictions are important considerations. It is also important to note that the infrastructural, technological, and legal amenities available in the current locations of western corporate headquarters would encourage these entities to stay where they currently are located. Finally, assuming that the commitment on the part of some corporations to abide by human rights standards though voluntary codes of conduct is sincere, it does not make sense that legislation mandating the same types of protections would result in a rapid expatriation. In this respect, the adoption of voluntary codes of conduct is a valuable endeavor. It shows that corporations are willing, and can afford, to raise their labor and environmental standards—negating one of the primary arguments against legislation mandating such improvements. The adoption of codes of conduct also seems to have resulted in general agreement that the “only way to solve [the] free-rider problem is through collective action.”<sup>91</sup> This recognition that corporations have collectively been free-riding and must collectively terminate this behavior is encouraging. However, it seems that the only real reason to favor voluntary codes of conduct over legislation forcing compliance with human rights law is to escape the potential of legal accountability if the standards are violated.

### C. *Institutional Shifting: Responses of Economic Institutions to Human Rights*

The interactions between human rights advocates and corporations have resulted in a variety of experiments with codes of conduct. A notable success of the human rights community in this effort has been the relatively common incorporation of human rights language *per se* in these codes.<sup>92</sup> This success can serve as a model for continued negotiation with the international economic institutions discussed in this section. The World Bank, IMF, and WTO, to varying degrees,

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<sup>91</sup> See, e.g., Spar, *supra* note 65, at 10.

<sup>92</sup> See, e.g., *supra* note 83 and accompanying text (describing business principles adopted by Reebok in 1990).

have been slowly accepting their roles in the promotion and protection of the ideas encompassed by human rights. Notable, however, is their discomfort with accepting and utilizing the strong utopian language of international human rights law and norms in their stated goals of sustainable development and poverty alleviation.

## 1. The World Bank

Prior to 1991, the International Bank for Reconstruction and Development (the World Bank) failed to recognize any nexus between its mission and human rights *per se*.<sup>93</sup> Between 1990 and 1991, however, the World Bank adopted two new institution-wide directives to stem the human rights abuses most often cited in connection with the development projects in which it was involved. The first directive addressed the problem of involuntary settlement, which often occurs when a development project is executed.<sup>94</sup> The second directive concerned the rights of indigenous people when development projects interfere with their well-being.<sup>95</sup>

Thomas Berger, who in September 1991 was appointed Deputy Chairman of the Independent Review of the Sardar Sarovar Projects, commenting on the policy directives leading up to his appointment, states:

These policy changes at the World Bank reflect the world-wide development of human rights concepts. These changes constitute a recognition that large-scale projects, especially in rural, wilderness and frontier areas, may displace people just as war and natural calamities do. The policy changes focus on people who are being displaced by the advance of development, and require that in any project the human rights of the oustees must be respected. According to the ILO,

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<sup>93</sup> See CAROL R. WILSON, *THE WORLD BANK GROUP: A GUIDE TO INFORMATION SOURCES* 294 (1991). This guide is a 247 page bibliography that gathers sources about the World Bank that were published or translated into English from 1944 to 1990. Books, periodicals, articles, government publications, pamphlets, and reference works are cited. The heading "human rights" does not even appear in this index. *Id.* at 301. Under "labor" there is one entry. *Id.* Similarly, under "Right to Development" there is one entry. *Id.* at 310. It is interesting to note that while human rights were paid so little attention before the early 1990s, there were twenty-two entries under the heading "environment." *Id.* at 290.

<sup>94</sup> WORLD BANK OPERATIONAL DIRECTIVE, *INVOLUNTARY RESETTLEMENT* (OP/BP 4.12) (2001).

<sup>95</sup> WORLD BANK OPERATIONAL DIRECTIVE, *INDIGENOUS PEOPLES* (OP/BP 4.10) (updated version to be adopted 2002).

these rights should not be impaired on grounds of national sovereignty or national economic interest. While such considerations may justify a project; they do not justify the nullification of these basic human rights.<sup>96</sup>

These directives reflect a shift in World Bank policy. They also serve as useful mechanisms to question the World Bank and the countries that it aids regarding human rights violations.<sup>97</sup>

After adopting the operational directives mentioned above, the World Bank established an Independent Review panel in 1991 to evaluate its Sardar Sarovar project in India.<sup>98</sup> This review was not entirely favorable and cited both the World Bank and the government of India for human rights abuses in the execution of the development project under review.<sup>99</sup> Ultimately, the author of the review asserted that development projects should be initiated only if they comport with human rights and environmental standards.<sup>100</sup>

As a result of negative reviews such as this one, the World Bank has tried to redirect its development projects toward small scale, integrated programs "that are economically sustainable, environmentally benign and embraced by the people they purport to help."<sup>101</sup> In 1997 the Secretary-General of the United Nations, Kofi Annan, stated his

<sup>96</sup> Thomas R. Berger, *The World Bank's Independent Review of India's Sardar Sarovar Projects*, 9 AM. U.J. INT'L L. & POL'Y 33, 41 (1993). The World Bank appointed Mr. Berger Deputy Chairman of the Independent Review of the Sardar Sarovar Projects in September 1991.

<sup>97</sup> See *id.*

<sup>98</sup> *Id.* at 33. "[T]he Independent Review developed out of controversy over whether India and the governments of Gujarat, Maharashtra, and Madhya Pradesh have complied with resettlement, rehabilitation, and environmental impact mitigation policies implicated in the Sardar Sarovar Projects." *Id.* at 33 n.2. The Sardar Sarovar project is a massive dam project in the Indian Narmada River valley to which the World Bank contributed a loan in the amount of 450 million dollars.

<sup>99</sup> "In some cases, involuntary resettlement resulting from the Sardar Sarovar offended recognized norms of human rights." *Id.* at 42-43. The author of the review called this result "ironic, given that both India and the World Bank have been in the forefront of efforts to secure human rights." Berger, *supra* note 96, at 43.

<sup>100</sup> Berger, *supra* note 96, at 47-48. Berger contends that "effective and equitable development" can be best achieved though integrating human rights obligations and a commitment to the environment into the initial design of a project. He criticizes beliefs that integrating these concerns into large-scale projects adds difficulty and cost. These beliefs "imply that human and environmental costs are to be heavily discounted in project planning and execution", which Berger argues are unacceptable in light of the past. He recommends looking for alternatives to projects that require large scale relocation or severely effect the environment. *Id.*

<sup>101</sup> Richard W. Stevenson, *The Chief Banker for the Nations at the Bottom of the Heap*, N.Y. TIMES, Sept. 14, 1997, § 3, at 12.

intention "to foster closer links among the human rights experts of the treaty bodies, the mechanisms of the United Nations Commission on Human Rights, and all the entities of the United Nations system, including the World Bank."<sup>102</sup> As part of this enlightened policy toward development projects, the World Bank invited hundreds of environmental, human rights, and poverty-fighting organizations to participate in World Bank initiatives and project analyses.<sup>103</sup> In fact, the World Bank produced a draft form Handbook on Good Practices for Laws Relating to Non-Governmental Organizations.<sup>104</sup> Further, when NGO's are involved in its projects, the World Bank now functions under a Good Practices Directive.<sup>105</sup> An increase in the number of NGOs monitoring and advocating human rights in the context of World Bank activity is a positive step in increasing enforcement of human rights norms.<sup>106</sup>

Still, there is reason for skepticism. At least one NGO has warned that the internationally protected right of freedom of association was potentially infringed upon by the 1997 draft of the Handbook for laws regulating NGOs and NGO behavior.<sup>107</sup> Also, there is evidence that even after the adoption of the directives mentioned above, the World Bank has continued to violate the human rights it has asserted it will aim to protect.<sup>108</sup> This is not surprising, given that, although individual member states may veto measures that aid countries that engage

<sup>102</sup> Kofi A. Annan, *Essay: Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities*, 10 HARV. HUM. RTS. J. 1, 7 (1997).

<sup>103</sup> Stevenson, *supra* note 101, at 13.

<sup>104</sup> THE INT'L CENTER FOR NOT-FOR-PROFIT LAW, HANDBOOK OF GOOD PRACTICES FOR LAWS RELATING TO NONGOVERNMENTAL ORGANIZATIONS: DISCUSSION DRAFT (1997).

<sup>105</sup> See THE WORLD BANK OPERATION MANUAL: GOOD PRACTICES: INVOLVING NON-GOVERNMENTAL ORGANIZATIONS IN BANK-SUPPORTED ACTIVITIES, GP 14.70 (2000). The February 2000 OPERATIONAL DIRECTIVE 14.70 replaces the original WORLD BANK DIRECTIVE 14.70, issued in March, 1998. *Id.* This WORLD BANK GOOD PRACTICES DIRECTIVE defines the role of NGOs in its activities. Among other things, it defines the types of NGO involvement and the limitations of NGOs seeking to participate in World Bank activities.

<sup>106</sup> See WORLD REPORT 1998, *supra* note 43, at xvi-vii.

<sup>107</sup> LAWYERS COMM. FOR HUM. RTS., THE WORLD BANK, NGOS AND FREEDOM OF ASSOCIATION: A CRITIQUE OF THE WORLD BANK'S DRAFT "HANDBOOK OF GOOD PRACTICES FOR LAWS RELATING TO NON-GOVERNMENTAL ORGANIZATIONS" 1 (1997) (arguing that improper regulation of NGOs can result in governmental suppression of unpopular organizations).

<sup>108</sup> For example, between 1985 and 1993, the World Bank contributed more than half of the 238 million dollars necessary to complete the Indonesian Kedung Ombo Dam Project. The construction of this dam and reservoir resulted in the displacement of 30,000 people in violation of Indonesian law and World Bank Policy. IN THE NAME OF DEVELOPMENT, *supra* note 47, at 4.

in gross human rights violations,<sup>109</sup> the World Bank does not require countries to guarantee observance of internationally recognized human rights as a precondition to receiving assistance. In fact, under the Bank's Articles of Agreement, its only lending criteria remain "economic considerations."<sup>110</sup> While this term has recently been interpreted to include health, environmental, and gender related matters,<sup>111</sup> the World Bank remains unwilling to condition its lending on a demonstrated commitment to human rights.

As late as 1998, the World Bank continued to present itself as a politically neutral institution,<sup>112</sup> independent of the human rights regime. However, in September 1998, in celebration of the 50th Anniversary of the Universal Declaration of Human Rights, the World Bank published a document declaring its commitment to integrating human rights concerns, especially economic, social, and cultural rights, in its activities.<sup>113</sup> In this publication, the World Bank acknowledged the need to reinvigorate its commitment to human rights,<sup>114</sup> increase its contacts with civil society,<sup>115</sup> and invited civil society to

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<sup>109</sup> See e.g., 22 U.S.C. § 262d (2000) (governing U.S. participation in international financial institutions, such as the World Bank and encouraging U.S. representatives to vote against aid to countries whose governments engage in gross human rights violations). At least one commentator has argued at length that such legislation runs the risk of harmfully politicizing the World Bank. See BARTRAM S. BROWN, *THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK: ISSUES OF INTERNATIONAL LAW AND POLICY* 232 (1992). However, even he acknowledges that:

[t]he bank could justify considering the human rights implications of proposed projects by referring to [its purpose enumerated in its Articles of Agreement]. Apparently some consensus on the relevance of human rights considerations to World Bank lending decisions has been reached among the Group of Seven countries (US, Japan, Germany, Britain, France, Italy and Canada) who control a decisive bloc of power within the Bank.

*Id.* at 240.

<sup>110</sup> DEVELOPING STATES, *supra* note 53, at 123.

<sup>111</sup> IN THE NAME OF DEVELOPMENT, *supra* note 47, at 3; see also VICTORIA E. Marmorstein, *World Bank Power to Consider Human Rights Factors in Loan Decisions*, 13 J. INT'L L. & ECON. 113, 129-30 (1978).

<sup>112</sup> For an assertion that the World Bank and other multilateral development banks are apolitical institutions, see ROBERT KNELLER, *HUMAN RIGHTS AND OTHER RESTRICTIONS ON WORLD BANK DEVELOPMENT ASSISTANCE: CONGRESSIONAL POLICY V. THE APOLITICAL PURPOSES AND FUNCTIONS OF THE MULTILATERAL DEVELOPMENT BANKS* 6-16 (1980).

<sup>113</sup> See generally THE INT'L BANK FOR RECONSTRUCTION AND DEV., *THE WORLD BANK, DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK* (1998).

<sup>114</sup> *Id.* at 1-3.

<sup>115</sup> *Id.* at 4, 26-29.

"continue to press the needs of the neglected, the isolated, and the victimized."<sup>116</sup>

Starting relatively quietly in June of 1999 and much more notably in November 1999, large numbers of activists and protesters began a concerted and loosely connected struggle to bring attention to the actions of the World Bank, IMF, WTO, and other international economic actors. Their activities brought a great level of attention to the issues surrounding the activities of these economic institutions and their social and environmental impacts. By raising popular awareness of economic globalization and World Bank activity, such protests have arguably placed the human rights community in a better position to negotiate with the economic community.<sup>117</sup>

This Article concerns itself with the contacts and negotiations between these two communities and, more importantly, the product of these contacts. It encourages human rights advocates to use this improved position to its fullest advantage, keeping in mind the power of the utopian language of human rights and its rhetorical appeal to a democratic public. As the human rights community makes inroads with the World Bank and other institutions, it is essential that human rights advocates adhere to the traditional language of human rights rather than seek the approbation associated with the traditionally economic language of the World Bank or other economic institutions.

## 2. The International Monetary Fund

Compared to the World Bank, the IMF continues to operate in greater isolation from human rights concerns.<sup>118</sup> In part, this is due to the IMF's primary concern with implementing macroeconomic policies that lead to "high productivity, high employment, high savings and consequently more investment and a higher flow of export trade."<sup>119</sup> The organization is less involved with the microeconomic issues in which the World Bank participates.<sup>120</sup> While the World Bank

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<sup>116</sup> *Id.* at 30.

<sup>117</sup> The efficacy of the protests, however, is neither the focus nor the concern of this Article. The protests by rights activists, in the framework of this Article, occur either on the margins of negotiations with the economic community or as a predecessor to such negotiations.

<sup>118</sup> See Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, 11 B.U. INT'L. L.J. 81, 87-88 (1993).

<sup>119</sup> DEVELOPING STATES, *supra* note 53, at 95.

<sup>120</sup> The IMF provides loans to countries facing balance-of-payment problems for the purpose of restoring conditions for sustainable economic growth. These loans enable countries to rebuild their monetary reserves, stabilize their currencies, and continue pay-

or regional development banks lend for specific projects, the IMF instead assists countries for discrete periods of time. Its macro level of operations, therefore, has sheltered the IMF from a direct linkage to human rights violations for longer than the World Bank or regional development banks.<sup>121</sup> Additionally, the shorter time frame of IMF involvement makes it difficult for the IMF to require member states to improve their human rights records during the period of IMF involvement in a particular project.<sup>122</sup>

Historically, the IMF was extremely reluctant to publicly suggest that it should play a role in the promotion of human rights objectives.<sup>123</sup> Since its inception, however, the IMF has been in a powerful position to influence human rights implementation in its member states.<sup>124</sup> Two mechanisms within the IMF procedures, Article IV consultation and conditionality, create avenues via which the IMF could advance human rights.<sup>125</sup> The IMF may consider political issues in

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ing for imports without having to impose trade restrictions or other strict monetary measures. See Rajagopal, *supra* note 118, at 89.

<sup>121</sup> See *supra* notes 94, 95, and accompanying text (discussing the World Bank Directives regarding involuntary resettlement and indigenous peoples).

<sup>122</sup> See Rajagopal, *supra* note 118, at 89–92.

<sup>123</sup> Daniel D. Bradlow, *Symposium: Social Justice and Development: Critical Issues Facing the Bretton Woods System*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 78–79 (1996). Further, Bradlow contends that it is difficult to even find the IMF's policy on human rights. The writings and statements of its representatives are the main indication of an IMF position on human rights. These writings and statements, however, send contradictory messages. They sometimes recognize the importance of human rights to the development process but at other times suggest that the IMF can not play a role in promoting human rights. Bradlow argues that these statements do not, however, "explain why, if human rights are so important, the IMF can ignore them in its operations and policies." *Id.* at 79 (citation omitted).

<sup>124</sup> *Id.* at 50.

<sup>125</sup> Article IV of the IMF's Articles of Agreement requires the IMF to engage in regular consultations with its member states about their exchange rate policies. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. IV, sec. 1, 29 U.S.T. 2203, 2208–10, 2 U.N.T.S. 39, 51 [hereinafter IMF Articles]. For a description of Article IV consultations, see, for example, RICHARD W. EDWARDS, JR., INTERNATIONAL MONETARY COLLABORATION 22, 558–68, 571–80 (1985). In practice, these consultations have often extended into a wide range of domestic policies. Bradlow, noting the scope of the consultations, suggests that the IMF has the capability of influencing the human rights practices in its Member States. See generally Bradlow, *supra* note 123. (citations omitted). During these consultations, "the IMF has been known to engage the Member State in discussions of its policies relating to health care, environment, welfare, housing, unemployment, labor markets, military expenditures, and certain aspects of the management of the State's public sector." *Id.* at 50.

Consultations, used by the IMF to develop its policies toward individual countries, can influence the conditions that a country must meet in order to access IMF funds. The degree of the IMF's influence varies depending on the Member State's need for financial



conducting consultation and in determining conditionality factors.<sup>126</sup> In fact, the IMF has more freedom to consider human rights issues than does the World Bank.<sup>127</sup> While the World Bank specifically began considering human rights issues some time ago, the IMF historically interpreted its Articles in a way that allowed it to remain uninvolved in advancing human rights.<sup>128</sup> The IMF did not construe its responsibility as one that required promoting human rights. Rather it construed its responsibility only as a duty to address the "social dimensions" of the macroeconomic policies it prescribes for member states.<sup>129</sup>

In 1995, however, there were two indications that the IMF was becoming more aware of its unique position to affect human rights. The first indication was the public IMF acknowledgment that "the importance of social issues for sustainable economic and social development has become increasingly evident."<sup>130</sup> At that time, the IMF recognized that it holds an important position of persuasion and expressed its intention to use that position to further "improv[e] governments' capacity to monitor social developments and pursue transparent social policies."<sup>131</sup> The IMF, however, expressed its intention to do this through policy discussions and technical assistance<sup>132</sup> rather than by establishing human rights or economic justice conditions on

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support. Since the advice given by the IMF in the Article IV consultations may be converted into the conditionalities attached to IMF financing, the IMF is able to exert greater influence over those Member States who need or expect to need its financial assistance. *Id.*

<sup>126</sup> See JOSEPH GOLD, INT'L MONETARY FUND, *THE RULE OF LAW IN THE IMF* 61 (1980). For more on conditionality and its relation to human rights, see generally Michael Lucas, *The International Monetary Fund's Conditionality and the International Covenant on Economic, Social and Cultural Rights: An Attempt to Define the Relation*, 25 REVUE BELGE DE DEDROIT INTERNATIONAL [Belgian Review of International Law] 104 (1992).

<sup>127</sup> Bradlow, *supra* note 123, at 81.

<sup>128</sup> See GOLD, *supra* note 126, at 61. Summarizing the IMF's official position, former IMF President, Michel Camdessus, has stated, "Nothing in our articles tells us that we have to look at the moral quality of the policies of the country. Nor do we have to consider whether the country is perfectly democratic or not." J. Oloka-Onyang, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights*, 26 CAL. W. INT'L L.J. 1, 25 n.141 (1995).

<sup>129</sup> See INT'L MONETARY FUND, *SOCIAL DIMENSIONS OF THE IMF'S POLICY DIALOGUE* 1-4 (1995), available at <http://www.imf.org/external/np/exr/facts/social.htm> (last visited Oct. 2, 2002) [hereinafter IMF POLICY DIALOGUE]. This pamphlet was presented by the staff of the IMF for the World Summit for Social Development in Copenhagen, March 6-12, 1995.

<sup>130</sup> *Id.* at 1.

<sup>131</sup> *Id.* at 3.

<sup>132</sup> *Id.*

the use of IMF funds.<sup>133</sup> The second indication of the IMF's increasing human rights awareness was its explicit recognition of the potential benefit of consultation with United Nations agencies with expertise on the "social dimensions" of human rights.<sup>134</sup> At that time, however, the IMF only hinted at the need to begin consultation with NGOs.<sup>135</sup>

Emerging from its 1999 annual meeting, the IMF began to openly and consistently acknowledge a role in poverty reduction and its associated human rights protections. At that time it decided to strengthen its focus on poverty by replacing the Enhanced Structural Adjustment Facility (ESAF) with the Poverty Reduction and Growth Facility (PRGF).<sup>136</sup> Loans under the PRGF are provided to the world's poorest countries and are based on Poverty Reduction Strategy Papers (PRSP), which articulate each borrowing country's strategy for poverty reduction and integrate macroeconomic, structural, and social policies into one document. The key features that distinguish the PRGF/PRSP procedure from the ESAF include vesting the borrowing country with design and ownership of its own poverty reduction strategy; integral participation of the World Bank in all poverty reduction

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<sup>133</sup> *Id.* at 4–6.

<sup>134</sup> "The IMF is collaborating closely with the World Bank and other agencies in the design, implementation, and monitoring of social policies." IMF POLICY DIALOGUE, *supra* note 129, at 2.

<sup>135</sup> For example, the IMF stated:

Improvement of monitoring and social policies and social indicators in the context of IMF-supported programs is being pursued as central to the achievement of sustainable high-quality growth. Improving collaboration with the World Bank, U.N. agencies, and others, with the objective that each institution focus on areas of comparative advantage, is the best way to achieve—without duplication of work—a better follow-up on the implementation of social policies in programs.

*Id.* at 27–28 (emphasis added).

<sup>136</sup> This decision emerged out of the annual IMF meeting of September 1999. The PRGF replaced the ESAF as the primary loan assistance program to poor countries facing balance of payment problems. The key features of this program are described herein. For a more detailed description of the Poverty Reduction and Growth Facility, see INT'L MONETARY FUND, THE IMF'S POVERTY REDUCTION AND GROWTH FACILITY (PRGF): A FACTSHEET (Mar. 2001), at <http://www.imf.org/external/np/exr/facts/prgf.htm> (last visited Oct. 2, 2002) [hereinafter POVERTY REDUCTION]. Prior to 1999, the IMF provided assistance to low-income countries through the ESAF. ESAF arrangements, established in 1987, provide medium-term loans on concessional terms to support macroeconomic adjustment and domestic reforms in poor countries facing trade deficits. For a more detailed description of the Enhanced Structural Adjustment Facility, see INT'L MONETARY FUND, IMF CONCESSIONAL FINANCING THROUGH ESAF (Sept. 1999), at <http://www.imf.org/external/np/exr/facts/esaf.htm> (last visited Oct. 2, 2002).

strategies; and involvement of scholars, international institutions, NGOs, and civil society generally in the design of the PRSPs.<sup>137</sup>

The IMF now intends to maintain consideration and incorporation of social policies at the level of the PRSP.<sup>138</sup> If PRSPs function as they are designed, the IMF's involvement in a given country's economic policy could provide borrowing countries with the opportunity to both assess their human rights situations and to design and implement strategies for improving domestic human rights protections. The May 2000 PRSP of Burkina Faso exemplifies a strategy that "places a high priority on human rights in its development and structural adjustment efforts."<sup>139</sup> Other countries took Burkina Faso's lead in viewing the PRSP as an opportunity to assess how better protection of human rights can aid in the development of their countries and how increased economic development can aid their efforts to advance human rights.<sup>140</sup>

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<sup>137</sup> See POVERTY REDUCTION, *supra* note 136.

<sup>138</sup> See *id.* It should be noted that the IMF is still unwilling to use conditionality as a way of promoting or encouraging respect for human rights in borrowing countries. Masood Ahmed et al., *Refocussing IMF Conditionality*, 38 FIN. & DEV. 4 (2001), available at 2001 WL 19654132.

<sup>139</sup> Sergio Pereira Leite, *Human Rights and the IMF*, 38 FIN. & DEV. 4 (2001), available at 2001 WL 19654133.

[T]he May 2000 PRSP of Burkina Faso centers on human security: economic security (access to education, vocational training, and paid employment), health security (access to low-cost preventive and curative medical care), food security (access to basic foodstuffs and safe water), environmental security (preservation of the environment), and individual and political security (the rule of law, responsibility, participation, efficiency, and transparency). The Burkinabè strategy does not promise that human security will be fully achieved during the life of the program, but it places a high priority on human rights in its development and structural adjustment efforts.

*Id.*

<sup>140</sup> Countries that have involved human rights in their poverty reduction strategy include Bolivia, Cambodia, Cameroon, Nicaragua, Rwanda, Tanzania, Uganda, and Vietnam. *Id.* Sergio Pereira Leite notes that:

Nicaragua's September 2001 PRSP proposes measures to demarcate lands belonging to indigenous communities, assist the poor to meet housing needs, protect children in high-risk conditions, implement programs for the elderly, prevent domestic violence, strengthen the Office for Human Rights, and protect the rights of indigenous peoples. Rwanda's November 2000 PRSP includes a framework for good governance that incorporates a human rights program, as well as capacity building for the country's Human Rights Commission.

*Id.*

The IMF's position on human rights demonstrates its interest in self-improvement and its ability to contribute to poverty alleviation—and thereby promote human rights. The degree and speed by which the IMF has re-oriented itself with regard to human rights is notable. Still, there is room for improvement. The IMF continues to view itself as an organization fundamentally unable to analyze human rights situations and concerns. Encouragingly, the IMF has made clear its commitment to continued improvement of its activities.<sup>141</sup> It has stated that it will depend on other international institutions, the work of NGOs, and civil society to help it in this arena.<sup>142</sup> Marked improvement to IMF policy can surely be made by involving these contributors. As will be discussed below, the vigilance of these actors in promoting the utopian language and ideas of human rights is essential to ensure that human rights are protected all over the world.

### 3. The World Trade Organization

The WTO is, without debate, the multilateral economic institution making the last stand for isolating its policies and practices from the incursions of human rights concerns. The historical progression of the WTO's position on collaboration with other multilateral institutions, NGOs, and civil society is very similar to such collaboration by the World Bank and the IMF. Until recently, the WTO had not fostered any real communication with its economic counterparts—despite agreements between the institutions to do so.<sup>143</sup> Further, it had not established formal methods for cooperation and communication between itself and the United Nations, the United Nations' human rights organs, or members of civil society, including NGOs.

Since 1999, the United Nations Sub-Commission on Promotion and Protection of Minorities has repeatedly publicized its concerns regarding the insular, non-transparent, non-democratic nature of WTO procedures<sup>144</sup> and the substantive effect of particular WTO

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<sup>141</sup> See, e.g., IMF POLICY DIALOGUE, *supra* note 129, at 27–28. See generally, INT'L MONETARY FUND ET AL., A BETTER WORLD FOR ALL (2000), available at <http://www.imf.org/external/pubs/ft/jointpub/world/2000/eng/bwae.pdf> (last visited Oct. 2, 2002) [hereinafter A BETTER WORLD FOR ALL].

<sup>142</sup> Leite, *supra* note 139.

<sup>143</sup> See WTO, COHERENCE—CLOSER COOPERATION BETWEEN MULTILATERAL INSTITUTIONS, available at [http://www.wto.org/english/thewto\\_e/coher\\_e/coher\\_e.htm](http://www.wto.org/english/thewto_e/coher_e/coher_e.htm) (last visited Oct. 2, 2002) (containing links to all relevant documents regarding coherence and cooperation with the World Bank and the IMF).

<sup>144</sup> See, e.g., UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HUMAN

rules or practices.<sup>145</sup> Commentators have also noted the insular nature of the WTO, the potential negative effects of the WTO's work on human rights, and the organization's reluctance to engage sectors of the international community concerned with human rights.<sup>146</sup>

It was not until its Fourth Ministerial Conference held in Doha, Qatar in November 2001, that the WTO first indicated some response to calls for change in its policy. The Doha Development Agenda, which resulted from this conference, refocuses the work of the WTO to the situation of the world's poorest nations and people.<sup>147</sup> Moreover, there is ample evidence that as a result of the Doha Development Agenda the WTO is undergoing a significant shift in its orientation and openness to human rights concerns and the welfare of the individuals affected by its work.<sup>148</sup> One example of this shift is the WTO's 2002 Annual Report, which acknowledges that "certain adjustments to

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RIGHTS AS THE PRIMARY OBJECTIVE OF INTERNATIONAL TRADE, INVESTMENT AND FINANCE POLICY AND PRACTICE, U.N. Doc. E/CN/Sub.2/1999/11 (1999); UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: STATEMENT OF THE UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS TO THE MINISTERIAL CONFERENCE OF THE WORLD TRADE ORGANIZATION, U.N. Doc. E/C.12/1999/9 (1999).

<sup>145</sup> See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HUMAN RIGHTS AS THE PRIMARY OBJECTIVE OF INTERNATIONAL TRADE, INVESTMENT AND FINANCE POLICY AND PRACTICE, U.N. Doc. E/CN/Sub.2/1999/11 (1999); UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: STATEMENT OF THE UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS TO THE MINISTERIAL CONFERENCE OF THE WORLD TRADE ORGANIZATION, U.N. Doc. E/C.12/1999/9 (1999); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE IMPACT OF THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS ON HUMAN RIGHTS, U.N. Doc. E/CN.4/Sub.2/2001/13 (2001); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: LIBERALIZATION OF TRADE IN SERVICES AND HUMAN RIGHTS, U.N. Doc. E/CN.4/Sub.2/2002/9 (2002); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: GLOBALIZATION AND ITS IMPACT ON THE FULL ENJOYMENT OF HUMAN RIGHTS, U.N. Doc. E/CN.4/2002/54 (2002) (encompassing the report by the High Commissioner on Human Rights regarding human rights approaches to the WTO's Agreement on Agriculture).

<sup>146</sup> See, e.g., Howse & Mutua, *supra* note 7, at ¶ 3.

<sup>147</sup> WTO, MINISTERIAL DECLARATION, WT/MIN(01)/DEC/1 (Nov. 14, 2001), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm) (last visited Nov. 9, 2002).

<sup>148</sup> See, e.g., Mike Moore, Making Globalization Work, Speech to the International Confederation of Free Trade Unions (ICFTU) (Feb. 20, 2002), available at [http://www.wto.org/wto/english/news\\_e/spmm76\\_e.htm](http://www.wto.org/wto/english/news_e/spmm76_e.htm) (last visited Oct. 2, 2002).

the [WTO] rules [are] needed if the trading system is to better reflect the social, economic, and political conditions of a rapidly changing world."<sup>149</sup> In this report, the WTO also addresses the high level of concern on the part of the United Nations, academic commentators, and NGOs regarding the WTOs' lack of transparency and abysmal record for consulting with civil society and NGOs.<sup>150</sup>

One proposal for facilitating WTO consideration of human rights law is to establish a human rights office at the World Trade Organization.<sup>151</sup> This proposal recognizes the current failings of both unilateral and multilateral human rights enforcement mechanisms. It argues that human rights advocacy and WTO enforcement mechanisms should be combined in order to take advantage of the strengths of the two systems.<sup>152</sup> Such a combination would be comprised of a multilateral regime using sanctions to enforce core human rights and remedy violations of those rights. Thus, the might of unilateral actions, in the

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<sup>149</sup> WTO, ANNUAL REPORT 2002, at 2 (2002). The Annual Report also notes:

Agreement still remains elusive on precisely how existing rules should be changed and what form necessary new rules should take. But at Doha the WTO achieved something that many skeptics had suggested was beyond the organization's grasp: the launch of a new trade round. Even the sternest critics of globalization today accept that the alternative to multilateral rules is reliance on the law of the jungle. With the Doha Development Agenda, we are now on course to negotiate the necessary changes and new rules.

*Id.* at 2.

<sup>150</sup> *Id.* at 4. The report states, in part:

Although there is no consensus among WTO Members in favour of involving NGOs directly in the organization's work, the existing guidelines on external relations were designed by Members to give the Secretariat an appropriate degree of flexibility to allow responsible NGOs a voice in the dialogue. Within these guidelines, an increasing number of symposia have been held, involving a wide range of civil society actors, including parliamentarians, chambers of commerce, trade unions and many groups with particular focus on such issues as development and the environment. We have also greatly improved the dissemination of information to the general public through our website, which in the first quarter of 2002 recorded more than half a million visitors per month. Visitors downloaded monthly the equivalent of over 100 million pages of text.

*Id.*

<sup>151</sup> Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U.J. INT'L L. & POL'Y 1, 4 (1996). For another proposal to introduce rights into the WTO, see Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 163, 163-181 (Compa & Diamond eds., 1996).

<sup>152</sup> Stirling, *supra* note 151, at 33.

form of trade sanctions by a powerful nation, can be made even mightier by the multilateral support of other less powerful nations.<sup>153</sup> One benefit of this approach is the possibility that a human rights office within the WTO could ensure that human rights are integrated into WTO policies in a transparent and predictable manner.

Another strategy for WTO reform lies in Article XX of the GATT. It is widely accepted that human rights advocates should focus on this section to support the inclusion of human rights concerns in the policy and decisions of the WTO.<sup>154</sup> Article XX of the GATT states that nothing in the GATT

shall be construed to prevent the enforcement by any contracting party of measures . . . necessary to protect public morals . . . human, animal or plant life or health, [or] relating to the conservation of exhaustible natural resource measures . . . essential to the acquisition or distribution of products in general or local short supply [and] . . . relating to the products of prison labour.<sup>155</sup>

One commentator contends that consideration of basic human rights has been a part of the GATT system since its inception. She points out that Article XX of the GATT, which allows the exclusion of products made with prison labor, has never been challenged by the GATT/WTO member states.<sup>156</sup> In fact, through advocating for a WTO social clause, a number of nations have pushed to include a wider range of human rights provisions.<sup>157</sup> Furthermore, Article XX(e) already lays the groundwork for a human rights body within the WTO. Trade and human rights are already linked within the GATT because "Article XX(e) appears to permit one member to use trade sanctions to protect the human rights of citizens of another member."<sup>158</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> See generally *id.*; Howse & Matua, *supra* note 7 (pointing to Article XX as a mechanism for the inclusion of human rights concerns in the policies and decisions of the WTO).

<sup>155</sup> GATT, *opened for signature* Oct. 30, 1947, G1 Stat. A3, 55 U.N.T.S. 184, 262. This was amended in 1994. See *id.* at art. XX.

<sup>156</sup> Stirling, *supra* note 151, at 35–36.

<sup>157</sup> A number of nations have declared their commitment to a wide range of labor protections, leading to the establishment of the World Commission on the Social Dimension of Globalization within the International Labour Organization. See INTERNATIONAL LABOUR ORGANIZATION, WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION: BACKGROUND, at <http://www.ilo.org/public.english/wcsdg/background.htm> (last visited Oct. 16, 2002).

<sup>158</sup> Stirling, *supra* note 151, at 38.

This proposal is appealing because it provides a multilateral mechanism for the enforcement of human rights that is intrinsically tied to entry into globalized trade. It is problematic, though, because it limits exposure to sanctions by limiting the rights—which if violated would be legitimate grounds for multilateral trade sanctions—to the most widely accepted civil and political rights.<sup>159</sup> Although this adheres to the traditional hierarchical structure of human rights, such a proposal has the effect of undermining a strand of the genealogy of Article XX, the very hook used to validate the proposal for a human rights office at the WTO.<sup>160</sup>

The WTO is no longer as insular or as opaque as it was just two years ago. The Doha Development Agenda changed the landscape for the WTO and for those who advocate for WTO inclusion of human rights concerns. Although it has not created official avenues for civil society's and the United Nations human rights bodies' participation, these sectors clearly have started to enter into negotiations with the WTO.

Mike Moore, the Director-General of the WTO, stated unequivocally in his farewell address to the WTO General Counsel that the WTO has a new focus to help the world's poor.<sup>161</sup> As his closing remark he stated: "I will continue to serve the public. I can think of no greater vocation. I may even join an NGO or march with the protesters to the gates of this very institution. You will know me immediately. My banner will say 'Justice Now, Finish the Round.'"<sup>162</sup> If this should ever come to pass, perhaps the new WTO Director General, Dr. Su-

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<sup>159</sup> *Id.* at 39. "These rights would include freedom from torture, collective punishments, prolonged arbitrary detention, genocide, slavery, or threats to commit any of these acts." *Id.*

<sup>160</sup> See ICESCR, *supra* note 84, at art. 7 (recognizing the right of everyone to the enjoyment of just and favorable conditions of work, which include fair wages and equal remuneration for work of equal value, as well as a right to safe and healthy working conditions). Stirling does, however, include freedom from slavery in her short list of human rights which should be enforced by the proposed WTO human rights body. Stirling, *supra* note 151, at 39. The right to freedom from slavery is set out in the ICCPR, stating: "No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited." ICCPR *supra* note 84, at art. 8.

<sup>161</sup> See Mike Moore, *Director General's Farewell Speech to the General Council* (July 31, 2002), available at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm89\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm89_e.htm) (last visited Oct. 2, 2002). He states therein that "The Doha Development Agenda is urgent too because more than half of the world's population continue to live on less than 2 dollars a day and a successful conclusion to the round can help lift billions of people out of poverty. This Agenda is about them. Our greatest motivation is the people we serve." *Id.*

<sup>162</sup> *Id.*



pachai Panitchpakdi, will see fit to open the doors and talk with both his predecessor and his newly befriended NGO colleagues.

#### 4. Shaping a Nexus: Encounters Between International Financial Institutions and Human Rights

International economic institutions quite clearly are uncomfortable with the language of human rights. They prefer to address specific "social issues" rather than open themselves to the far broader and more substantive area of human rights. To illustrate, in 2000 the IMF, together with the United Nations, the World Bank, and ECOSOC, published *A Better World for All*, which stated the joint commitment of these organizations to alleviate poverty and consider development-related issues.<sup>163</sup> Although this document does mention human rights generally, it neither names specific articles of the basic human rights documents nor directly refers to specific human rights per se. When referring to its specific goal of reducing infant mortality rates, for example, the document does not refer to this "social issue" as embodied in Article 12(2)(a) of the International Covenant on Economic, Social and Cultural Rights.<sup>164</sup>

Likewise, the IMF's and the World Bank's uneasiness with assigning these "social issues" their internationally accepted status as human rights was again made clear in January 2002 when the IMF Managing Director and the World Bank President held a Townhall Meeting with civil society representatives participating in the International Conference on Poverty Reduction Strategies. When addressing the particular topic of labor and union movements on behalf of both institutions, James Wolfensohn, the World Bank President, gave this illustrative comment:

I just met a few months ago with John Sweeney on the subject, and we're in regular contact with the international labor union movements to try and see what we can do to bridge that gap. But I really believe that, while we don't call it a rights-based approach, which Mrs. Robinson would like us to do, on each issue we are, in fact, addressing the questions which Mrs. Robinson is addressing.

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<sup>163</sup> See generally *A BETTER WORLD FOR ALL*, *supra* note 141.

<sup>164</sup> See ICESCR, *supra* note 84, at art. 12(2)(a). The document does, however, detail the combined goals of all these organizations to improve and promote this and other "social issues" which, in the ICESCR and the ICCPR, have previously been accorded the status of rights. See generally *A BETTER WORLD FOR ALL*, *supra* note 141.

I don't want to move to a rights-based approach because I think I'm stronger in what I'm doing, but we will continue the discussion with Mrs. Robinson on whether it should be [framed that way] . . . .<sup>165</sup>

While clearly acknowledging the importance of the goals enumerated in established human rights instruments, and in fact stating that the World Bank and the IMF are "addressing the questions" which human rights law aims to address, the reluctance of the World Bank President to take a "rights-based" approach is puzzling. If the work of these financial institutions is, as President Wolfensohn suggests, substantially equivalent to what it would be if they used a rights-based approach, it seems essential to press for the reasons behind their reluctance to use the language of rights.

While there may be disagreement over which rights international financial institutions have a responsibility to uphold, there should be little disagreement that these institutions now consider the ideas embodied by human rights a factor in their operations. Increasingly, human rights advocates and international law scholars are focusing on these institutions. Consequently, a perceptible institutional awareness of the importance of advancing universally accepted human rights has taken hold.

In the World Bank and increasingly in the IMF, this awareness has now taken a relatively strong hold. In the WTO, however, it is still in the early stages of development and remains opaque and largely undefined. This institutional shift is crucial to increasing the promotion of human rights and the quality of human rights enforcement mechanisms.<sup>166</sup> Similarly, the entry of human rights into the every-day conduct of transnational corporations is evidenced in the voluntary as well as government-mandated and institutionally imposed codes of conduct discussed herein.

The question should no longer be *whether* these economic international institutions and transnational corporate actors will become locations for the protection and advancement of human rights but rather *how* this shift will come about. This brings to the fore a whole range of pressing inquiries, some of which have been addressed in the

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<sup>165</sup> Townhall Meeting: IMF Managing Director Host Kohler and World Bank President James Wolfensohn with Civil Society Representatives Participating in the International Conference on Poverty Reduction Strategies (Jan. 17, 2002), available at <http://www.imf.org/external/np/tr/2002/tr020117a.htm> (last visited Oct. 2, 2002).

<sup>166</sup> See, e.g., Stirling, *supra* note 151, at 15–16, 45–46.

discussion above: in what capacity will traditionally economic actors advance human rights; to what extent will they do so; and which rights should be promoted or enforced. While the questions are simple, the answers will be complex. They should be developed carefully with the intention of encouraging active awareness of these rights and the recognition that international financial institutions can play a crucial role in the implementation and enforcement of human rights. Long overdue, the coming challenge is to maintain intellectual fortitude in the advancement of human rights at the points of contact with the economic sector.

For the purposes of this Article, it is important to be cognizant of the entries that the human rights community, its law, and its norms have made into the international economic sector. These entries amount to a novel but tangible encounter that has been revealed through the investigation undertaken above. The next section of this Article discusses one specific aspect of this interaction: the language used, defined, and developed during the interchange between human rights institutions and advocates and their international economic counterparts. Specifically, this Article addresses the imperative of conducting the interaction between these two international domains in a language that maintains the compelling essence of human rights. It argues that this should be done in the interest of creating and advancing a language of encounter that strengthens and promotes rights. Essentially, it is an optimistic view of the potential for forging language that enhances public international law and places human rights concerns squarely at the center of international economic activity and policy.

### III. ANALYSIS OF A DISCOURSE

#### A. *The International Plane*

Many social scientists have noted the emergence of "the Global City" or its equivalent.<sup>167</sup> The amalgamation of international communities with differing interests, however, is better described for the

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<sup>167</sup> See SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* 335 (1991). Sassen points to the many ways that the distinctions between important cities are merging or blurring. For example, she illustrates that this is happening through a hegemonization of culture with the result that each city is losing its individual character, and she also proposes that for those individuals whose work and leisure makes them dependent on more than one of these hubs, the boundaries that once defined travel between countries are disappearing. See *id.* at 335-38.

purposes of this Article as the international plane. This distinction is necessary because the image of a global city or the global village implies a theoretical space where the inhabiting population gathers into one group, in a domain small enough to imagine its current and future boundaries.<sup>168</sup> Further, this image implies that there is some form of infrastructure, generally government, necessary to conduct the negotiations and compromises needed for a culturally disparate and diverse populace to co-exist.<sup>169</sup>

The novelty of the interactions between human rights and international economic actors suggests a space much different than that of the global city. The international plane envisioned here, though identifiable, is still largely uncharted. It is possible to identify the individuals, groups, and institutions participating therein. It is also feasible to discern the locations of action and interaction of these parties. But defining locations of activity is different than identifying a cohesive and delineated place called a city. The international plane is not a singular location with definable boundaries. In fact, boundaries currently seem to be its antitheses structure, from which the participants aim to escape. In this way, the international plane is different than a city.

Additionally, unlike a village or a city, there is no singular form of government under which all participants are expected to behave.<sup>170</sup> A cohesive set of decrees constituting governmental control does not exist; there is no legal structure with which *all* the actors in this international plane must comply. The locations of activity on the international plane—the various forms of international law, cross-border business transactions, immigration, tourism, et cetera—each have rules governing particular activities or fields of work. For example, international financial institutions have articles of agreement and are founded on a shared philosophy that aims to advance liberal eco-

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<sup>168</sup> Black's Law Dictionary defines village as: "a modest assemblage of houses and buildings for dwellings and business. . . [or] a municipal corporation with a smaller population than a city." BLACK'S LAW DICTIONARY, *supra* note 11, at 1563. A city is defined as "a municipal corporation . . . headed by a mayor and governed by a city council." *Id.* at 237.

<sup>169</sup> See *id.* at 237, 1563 (defining city and village). It is not the purpose of this article to discredit the use of terms like global city and global village. However, it is important to note how the use of cities and villages for illustrative analogy is not entirely accurate. Because this Article discusses issues that arise in the collision of populations that are real and analogized, it is necessary to illustrate the failings of these words for the analytical purposes of describing globalization.

<sup>170</sup> For the suggestion that such an order is possible, see Kenneth S. Carlson, *International Administrative Law: A Venture in Legal Theory*, 8 J. PUB. L. 329, 329–77 (1959).

conomic policies such as free and fair trade.<sup>171</sup> Those advancing a global economic order act in accordance with these philosophies. They abide by and frame their work around the rules and policies central to their institutions. Similarly, human rights institutions share a common vision, as evidenced by the Universal Declaration for Human Rights and subsequent human rights instruments.<sup>172</sup> The individuals participating in the development of human rights law act in accordance with the philosophies, rules, and procedures that are common to human rights actors and often distinct from those of economic actors.

Participation in the global involves reaching across national borders in an attempt to join people with commonalities on a global scale. This act creates new places of activity. For example, internet specialists and browsers connect with their foreign counterparts in the territory they call cyberspace. Similarly, indigenous peoples transgress the boundaries of nations and create a new location when they gather at the United Nations for the annual meeting of the Working Group on Indigenous Peoples.<sup>173</sup> The very name of the organization "Doctors Without Borders" is indicative of this characteristic.

Within the legal profession, too, specialization and internationalization abounds. Immigration specialists work with their counterparts in various countries; human rights advocates do the same. They create and populate sites of globalized activity. The World Bank and the IMF have explicit policies of hiring lawyers from a wide range of countries who are trained in international economic law.<sup>174</sup> These

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<sup>171</sup> Compare IMF Articles, *supra* note 125, with Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134. It is not at all surprising that these institutional charters are very similar. They were both born from the Bretton-Woods conference, which was executed by a small number of participants with similar visions for economic stability.

<sup>172</sup> This is not to diminish the differences between human rights documents. Clearly, there are differences, but it is indisputable that there are also similarities in language, in the rights advanced, and in the liberal philosophy that underlies the documents.

<sup>173</sup> For a description of the creation of this United Nations Working Group see S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 51 (1996). For a detailed description of the success of this Working Group and evidence that it does provide a forum for indigenous people from a multitude of countries to develop principles that will protect them, see David Weissbrodt et al., *An Analysis of the Forty-ninth Session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 11 HARV. HUM. RTS. J. 221, 237 (1998).

<sup>174</sup> See, e.g., INT'L. MONETARY FUND, *DIVERSITY POLICY*, available at <http://www.imf.org/external/np/adm/rec/policy/divpolicy.htm> (visited Oct. 2, 2002) (stating the IMF's commitment to strive for balance in the gender and nationality composition of its staff in order to achieve its goal of creating a successful international work place).

finance and economics-focused lawyers incarnate yet another community with its own interests. Although institutions, seminars, and conferences are the actualization of these locations, they can exist without physical or material places. These sites of activity can be identified and are tangible without actual embodiment. Thus, even actors not present physically in international institutions can participate in their particular specialized field at the international level. Similarly, the domain that makes up international human rights activity does not cease to exist on days without international conferences or meetings. Rather, this domain exists, at least on some level, simply because people believe themselves to be participants in international activity and actors on an international plane.

What seems to emerge, therefore, is not a single global city but an accumulation of many theoretical locations that can be described as communities or perhaps sovereigns of a sort. Each is composed of individuals who, through self-identification with a particular activity or profession, participate in the life of that community.<sup>175</sup> We can tenuously call these communities sovereigns, because, to a large extent thus far, they have governed themselves while creating a territory that is not governed by the whole or by any superstructure. Each of these communities are bound by a mass of conflicting laws and interests of the various national jurisdictions of their participants. Upon entering the international plane, however, their relations with one another are also defined by the rules of the particular international community. Yet there is no overarching government that regulates or provides a single forum for interaction, cooperation, or conflict among these internationalized communities.<sup>176</sup>

This absence of government, defined mechanisms, and forums for communication among the various communities that comprise the international plane creates a vacuum. When two or more communities expand or shift in a direction that impacts another commu-

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<sup>175</sup> See ARJUN APPADURAI, *MODERNITY AT LARGE* 22–23 (1996) (portraying the propensity to group cultures according to difference rather than similarity). While Appadurai may be correct that “the emergent postnational order” may be based on relations between interest groups, this Article challenges his assertion that the negotiations that make up those relations will result in “increased incivility and violence.” Perhaps because this Article discusses the interaction between two communities that hold in common the liberal social contract of the modern West, it focuses on points of cooperation rather than pure contestation. See *id.* at 23.

<sup>176</sup> See Carlson, *supra* note 170, at 182.

nity's zone of interest, an encounter results.<sup>177</sup> The communities or regimes then can either ignore any resulting discord or enter into negotiations. Negotiations, naturally, can either lead to compatibility or continued and more elaborate discord.<sup>178</sup>

Part II of this paper demonstrated one point of encounter: the demonstrable interaction of the human rights domain and the international economic demesne. Presently, these two modern, liberal realms, originated and maintained as separate worlds on the international plane, are investigating each other. Of course there are points of contact between these communities that remain in thorough discord. As the points of tumultuous conflict, they attract significant popular attention.<sup>179</sup> More surprising and encouraging about these points of encounter, however, is the cooperation that emerges from them. Part II demonstrated a series of encounters and long negotiations that have resulted in significant cooperation. The remainder of Part III discusses prospects for future encounters. Specifically, this section examines the language that these interactions emit, illustrating the importance of consciously maintaining and promoting the strong aspirational language of human rights.

### *B. Prospects for Future Encounters*

As a preliminary matter, it is vital to examine the environment in which the negotiations are taking place. The international economic community and international human rights communities can not discern the limits of their present day scope and reach, much less their future. They interact in a space not facilitated or regulated by any

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<sup>177</sup> One should note here that the remainder of the discussion further illustrates what Robert O. Keohane describes as "harmony;" the situation in which two international communities' "policies (pursued without regard for the interests of others) are regarded . . . as facilitating the attainment" of each community's goals. ROBERT O. KEOHANE, *AFTER HEGEMONY* 53 (1984).

<sup>178</sup> *Id.*

<sup>179</sup> The failed MAI and the criticism that surrounded it illustrate this type of interchange. See *supra* note 77 and accompanying text. The rights that the MAI aimed to enforce, as was discussed above, directly impacted upon pre-established universal human rights. However, aware of the existence of human rights doctrine, especially in light of the NAFTA and GATT negotiations, the OECD attempted to conduct the negotiation for the MAI without regard for the conflicts between international economic and international human rights law that it would create. Unwilling to negotiate directly with human rights institutions or NGOs, however, the mutinous MAI would have created a site of unresolved discord between the human rights community and the economic community. The resulting conflict, in fact, lead to the death of the MAI. Another, now infamous, example lies in the 1999 anti-globalization protests and those that have subsequently ensued.

governmental superstructure. Finally, the only potential resisters of their interactions are the sovereign nations affected by the outcomes of the interchange. Thus the obstacle to determining and implementing results that promote and protect human rights will be the ability to convince nations that, on balance and over time, the results serve their interests.

The 1990s were an era of renewed and intense interest in foreign direct investment. The human rights community, witnessing this activity, derived two conclusions. First, it concluded that TNC's and investors have a responsibility not to allow degradation of the environment and abuse of the labor force to be considered tools for profit-maximization. This conclusion fueled desires to implement codes of conduct regulating the actions of transnational corporations.<sup>180</sup> Second, as evidenced herein, as the desire to attract foreign capital and investment experiences ebbed and more countries were willing to sign treaties like the GATT, human rights groups saw the excitement over neo-liberal economics as an opportunity to form ties with the global economic actors and, thereby, to advance human rights.

Using international financial institutions, human rights advocates hope to convince countries that have thus far resisted pressure to accept the legitimacy of liberal human rights to do so in concurrence with western liberal economic models, or rather, to adopt liberalism as a complete rather than as a bifurcated or partial package. Additionally, those countries that already have acquiesced to the liberal economic model may be able to use financial institutions to strengthen the pressure to observe and enforce human rights. If human rights or scrutiny over "social issues"<sup>181</sup> are included as part of the package of WTO, IMF, or World Bank membership, both of these objectives will be furthered. Perhaps, if the benefit to a given country of the liberal economic model is viewed as indisputable and sizable,

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<sup>180</sup> One should note that codes of conduct may have limited effect. For example, a recent report shows that even though Nike has implemented a code of conduct, it never posted a code of conduct on the premises of any of its Jakartan facilities, the workers had never heard of a code of conduct, the terms of the code of conduct were never implemented, and the code was commonly violated. See *Nike Sweatshop Suit* (Nat'l Public Radio broadcast, Apr. 21, 1998) (on file with author); Jennifer Lin, *Anti-Nike Backlash Growing over Worker-Abuse Reports*, THE FLORIDA TIMES-UNION (Jacksonville), Apr. 4, 1998, at A1 (describing instances of worker abuse in Nike factories in Vietnam and South Korea).

<sup>181</sup> The discussion herein of the IMF decision to examine social issues in connection with its involvement in particular countries demonstrates that countries may be willing to submit to examination and scrutiny of their domestic human rights practices in order to access IMF funds. There have been no instances in which a country decided not to use IMF funds because of this new policy.



the cost of succumbing to human rights and enforcement thereof will seem diminished in comparison.

This thought process has led human rights institutions and organizations to pressure the international economic community to integrate human rights into their activities. While it is notable that this pressure results in various cooperative efforts between these two communities, it should not be surprising. Both traditions emerged in part from liberal ideology, and both sets of institutions aspired to create a stable and peaceful world order.<sup>182</sup> Further, architects of both systems believed that multilateral bodies are central to addressing global problems. In order to legitimate their claims to universality, both communities seek to persuade all sovereign nations that their models for addressing global problems are meritorious. Additionally, founders of the Bretton Woods System recognize that "a growing number of economic, environmental, and social problems are beyond the ability of the IMF, the World Bank, and the GATT to manage."<sup>183</sup> Accordingly, they have commenced an inquiry on how these institutions can respond to such problems.<sup>184</sup>

One must also consider the similar attributes of the individuals who make up both of these communities. Most have received extensive education—many of them in the same educational facilities in London, Oxford, Cambridge, New York, or Washington—during which these individuals confirmed their membership in a cosmopolitan class.<sup>185</sup> These common experiences simplify encounters by diminishing fundamental issues, such as the national language in which discussions will be conducted and the rules of professional and social conduct to be observed with one another. These commonalties possibly have assisted the human rights community in persuading their economic counterparts to enter negotiations and in implementing the outcomes of such negotiations.

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<sup>182</sup> See, e.g., Margaret Garritson de Vries, *The Bretton Woods Conference and the Birth of the International Monetary Fund*, in BRETTON WOODS, *supra* note 28, at 4 (stating that officials in the U.S. State Department in the early 1940s, convinced that "economics had been the missing ingredient in the failed League of Nations' efforts to secure world peace, were thinking in terms of a liberal international trade regime after the war").

<sup>183</sup> BRETTON WOODS, *supra* note 28, at vii.

<sup>184</sup> See *id.*

<sup>185</sup> For examples of this experience see APPADURAI, *supra* note 175, at 1-23, 48-65. It is also significant that English has been accepted overwhelmingly as the diplomatic national language of this cosmopolitan class. For example, 96 members of the GATT conduct their work in English alone. COULMAS, *supra* note 5, at 188.

The ability to compromise about the subjects and areas for negotiation has also been important in convincing the international economic domain to interact with the human rights community. Codes of conduct, IMF PRSPs, a human rights office at the WTO, and the importance of the poor and underrepresented assume the continued existence and vigor of the economic domain. This assumption has created a space for financial institutions to permit human rights to enter their fields without formally conceding their own set of bundled sovereignty rights, which they would prefer to maintain. Successful proposals for interaction between these two entities likely will further human rights interests while assuring international financial actors that this will not result in their own loss of autonomy or importance in world affairs.

There is one final characteristic of the individuals who make up these two particular legal communities. As lawyers, these individuals are likely to be extremely focused on the importance and potency of words.<sup>186</sup> They belong to a profession that passionately haggles over meanings of individual words in order to arrive at a definition most favorable to the client or to the interest they serve.<sup>187</sup> Further, as international lawyers, most of them have experienced the power of language when they have either been empowered or marginalized in conversations, depending on their ability to speak various national languages.

One should not underestimate the language-creating capacity and experience of both societies. For example, many of the nouns used in this essay—nouns as important and obvious as WTO, NAFTA, GATT, IMF, World Bank, ICESCR, ICCPR, and UDHR—were created and have entered into use since 1940. These communities also continue to adopt verbs and vest them with specific meanings that reference their particular activities. One such verb that will be addressed below is “consult,” though there are others like “coordinate,” “exhaust” (domestic remedies), “intervene,” and “adjust” each of which have very specific definitions in particular contexts. Among people who are formally trained or at least exposed to the importance of negotiation and “getting to yes,”<sup>188</sup> the points of encounter of these

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<sup>186</sup> LAKOFF, *supra* note 4, at 12.

<sup>187</sup> See, e.g., Chuang, *supra* note 3, at 73, 80–90 (discussing definitional issues regarding the classification of forced labor and trafficking practices).

<sup>188</sup> Each year, over 100 people are trained at Harvard Law School alone in a negotiation seminar that teaches the negotiation models proposed in ROGER FISHER, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991). While it is not clear

communities will be heavily centered on negotiations regarding the promulgation and definition of the language that will define future cooperation between them.

### C. *The Nexus of Different Languages for Special Purposes*

At the nexus of these two very different languages for special purposes—one focused on rights, the other on economic activity—grows a new language for the purpose of integrating human rights and international economic policies.<sup>189</sup>

If one envisions languages as tools that serve particular needs, and further assumes that the users of such tools will choose language suitable to their specialized purposes, it is natural to conclude that, as communicative needs evolve, so must the languages used by their speakers.<sup>190</sup> In the context of the nexus shaping between international human rights and economic actors, there is evidence of this evolution. The resulting language will likely be an amalgam of the two original languages, which is better adapted to its purpose.<sup>191</sup> Linguists have developed the terms "pidgin," "Creole," "lingua franca," and "vehicular language" in order to explain the new languages that emerged from traditional colonial era encounters.<sup>192</sup> Largely referred

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that it is one of the purposes of such workshops and of the book, the effect is that many of the world's most educated and able negotiators are educated on the same methods and rules of negotiation and share a common idea of what form such negotiations should take. It is also relevant that this book is translated into many languages, providing this methodology to negotiators without English skills in a large portion of the world.

<sup>189</sup> See COULMAS, *supra* note 5, at 154–66.

<sup>190</sup> *Id.* at 154.

<sup>191</sup> Examples of this result have already surfaced and will be discussed below.

<sup>192</sup> ANTHONY & GATES, *supra* note 6, at 520; COULMAS, *supra* note 5, at 157; STEVEN PINKER, *THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE* 33 (1995). In order to facilitate the following discussion, readers should understand the definition of the following terms: Pidgin: A simplified speech used for communication between people of different languages. The linguistic variation known as "pidgin" develops in areas where intense social intercourse between members of drastically different cultures takes place. Pidgin, which develops out of this linguistic heterogeneity, is a simplified system of communication. The maturation of pidgin and its adoption by subsequent generations results in a creolization of the language. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction* 100 YALE L.J. 1329, 1342 n.49 (1991). Creole: a language based on two or more languages that serves as the native language of its speakers; a creole language emerges when new students of a pidgin language do not have access to the languages that originally formed the pidgin language and therefore learn the pidgin language as an integral language. Creoles are sophisticated variations of pidgin with increased vocabulary and grammatical devices and are considered normal languages by sociolinguists. PINKER, *supra*, at 33; Matsuda, *supra*, at 1342–43. Lingua Franca: Any of various languages used as common or commercial tongues among peoples of diverse speech;

to as "trade languages" because of their colonial history, pidgin languages are the first to develop at locations of exchange after initial unstable jargon becomes insufficient.<sup>193</sup>

The language emerging from international economic and human rights encounters can be analogized to the pidgin language formation of the colonization era. These common forms of language adaptation arose from "situations of social pressure and inequality"<sup>194</sup> and were typically despised for lacking the "prestige of a literary tradition and socially respected speakers."<sup>195</sup> Thus, the language emerging from the nexus of these two communities matches the characteristics of a pidgin language with the possible exception of the social respect that its speakers enjoy.<sup>196</sup> Nonetheless, the analogy is at least functional in every other respect. Both the human rights and the international economic communities feel pressure to interact in order to further their own aims. Additionally, these two international law domains are unequal in popularity and enforceability.<sup>197</sup> Finally, the pidgin language emerging from the interaction of these two communities will be influenced by, but independent of, the literary tradition of either international economic law or human rights.<sup>198</sup>

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something resembling a common language. Vehicular Language: In its broader definition, this term can be used synonymously with lingua franca. COULMAS, *supra* note 5, at 190 (citing William J. Samarin, *Lingua Francas of the World*, in J.A. FISHERMAN, READINGS IN THE SOCIOLOGY OF LANGUAGE 661 (1968)).

<sup>193</sup> COULMAS, *supra* note 5, at 161–62; PINKER, *supra* note 192, at 33–34.

<sup>194</sup> COULMAS, *supra* note 5, at 158–59.

<sup>195</sup> *Id.* at 159.

<sup>196</sup> While it is true that the individuals forging links between these two communities are highly scrutinized by their colleagues, there is no evidence that they are generally disrespected within their own fields.

<sup>197</sup> For another articulation of this inequality, see David Kennedy, *Receiving the International*, 10 CONN. J. INT'L L. 1, 4–5 (1994).

<sup>198</sup> It is interesting and important to note that pidgin languages and linguas franca are not a phenomenon only of historical economic activity between people of different origins. There is evidence that for many leaders of economic policy from non-English-speaking nations, the ability to communicate at some level of proficiency was essential in an economic world order dominated by English. Victor L. Urquidi, one of the primary Mexican representatives at the Bretton Woods Conference writes:

Because my English was better than Cosío-Villegas's, though far from entirely correct (English, by the way, was the only official working language and no simultaneous interpretation was available), I had drafted [a statement on the reorientation of the IMF and World Bank goals to include development rather than only reconstruction] myself and read it out loud.

Urquidi, *supra* note 18, at 42.

Thus far, the language that has emerged from the points of contact illustrates the tendencies of language formation between these two communities and the resulting power balances. "Consult" is one illustrative word, together with its variations. Human rights and international economic advocates alike, since the creation of their respective institutions, have used consultation as the method to connect with nation-states. Both have defined consultation similarly and use this activity to understand state practices and influence their policies. Agreement over this word enabled the World Bank to consent to consult with human rights nongovernmental organizations as one of the first formal cooperative breakthroughs between these communities.<sup>199</sup> Consultation was identified as an activity that did not require negotiation over the definition itself, and in which both communities have extensive experience and facility.

Perhaps more interesting is the development of new words or word meanings previously not used by either community. For an example of language creation, the IMF case is helpful. While the IMF has been slow to make public statements about its responsibility vis a vis human rights, it has promulgated a formal statement about the "social dimensions" of its work.<sup>200</sup> In this statement, the IMF recognizes that it "has major implications for the three core issues of the World Summit on Social Development (WSSD)—poverty alleviation, promotion of employment, and social integration."<sup>201</sup>

Social integration—as defined in U.N. documents for the Social Summit—concerns the ability of different groups in society to live together in productive and cooperative harmony and to accommodate differences within a framework of common interest to the benefit of all. Social integration implies justice for the individual and harmony among different social groups and countries. It means integration of disadvantaged and vulnerable groups by making all institutions of society more accessible to them.<sup>202</sup> The IMF recognizes that "vulnerable

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<sup>199</sup> See discussion of World Bank-NGO consultation *supra* Part II.

<sup>200</sup> See discussion on IMF consideration of social issues *infra* note 163–165, and accompanying text. As economic and social developments are mutually reinforcing, these policies are essential for reducing poverty and engendering social integration in the medium term. At the same time, the IMF also recognizes the importance of sound social policies aimed directly at achieving social objectives. Increased attention to these aspects of the IMF's work would serve to enhance the political sustainability of economic reforms.

<sup>201</sup> IMF POLICY DIALOGUE, *supra* note 129, at 3.

<sup>202</sup> See UNITED NATIONS, GENERAL ASSEMBLY, REPORT OF THE WORLD SUMMIT FOR SOCIAL DEVELOPMENT, U.N. Doc. A/Conf.166/9 (1995), available at <http://www.un.org/documents/ga/conf166/aconf166-9.htm> (last visited Oct. 2, 2001).

groups need to be protected through well-targeted social safety nets” and that IMF-supported programs should improve access to social services, including primary education and health.<sup>203</sup>

The list of IMF “social issues”—poverty alleviation; employment; social accommodation for disadvantaged individuals and groups; and access to public service including health and education programs—roughly corresponds to rights found in the ICCPR and ICESCR. Poverty alleviation evokes the right to an adequate standard of living, including food, clothing, and housing. These are rights protected by nearly all of the ICESCR. The right to employment corresponds specifically to Article 6 of the same document that protects the right to work. Similarly, the created term “social integration”<sup>204</sup> and its officially promulgated definition correspond to a number of rights enumerated in both the ICESCR and ICCPR, including the right to self-determination,<sup>205</sup> the right to be free from discrimination,<sup>206</sup> and the right to social involvement in society.<sup>207</sup> Finally, the rights of access to public services, including health care and schooling, are also protected in the ICESCR.

Instead of recognizing and citing these rights as the foundation for the “social dimensions” of its work, the IMF currently distances itself from human rights norms and documents by using ambiguous language that loses the moral imperative and the legal efficacy of the rights enumerated by foundational human rights documents.

It is encouraging that the IMF has made the step of at least incorporating “social issues.” It is important to note, however, the negative implications of allowing an international institution to invent language when it does not fully address the human rights problems to which it claims to be attentive; it potentially could both demote the legal potency as well as obfuscate the global familiarity that human rights language has attained. It is important to retain the character of a particular human right as a right, rather than allowing it to be framed as a “social issue.” One international legal scholar explains that “characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree

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<sup>203</sup> IMF POLICY DIALOGUE, *supra* note 129, at 2.

<sup>204</sup> *Id.* at 3 n.1.

<sup>205</sup> ICESCR, *supra* note 84, at art. 1; ICCPR, *supra* note 84, at art. 1.

<sup>206</sup> See, e.g., ICCPR, *supra* note 84, at arts. 1, 2, 25; ICESCR, *supra* note 84, at arts. 18, 19.

<sup>207</sup> This right is protected by a number of the provisions of both the ICCPR and the ICESCR.

of immunity from challenge, and generally endows it with an aura of timelessness, absoluteness and universal validity."<sup>208</sup>

Arguably the entire discussion of sustainable development and the alleviation of poverty is evidence of the continued interaction of these two communities, the first rhetorical and substantive fruit of their cooperation with one another. It is notable that joint publications such as *A Better World for All* have been framed entirely in this language of poverty alleviation and attention to the world's least privileged people. A trend that seems to be emerging in these joint documents is common reference to a particular topic of human concern as a social issue rather than as a human right. These are all hints of an emerging Pidgin language.

Each new linguistic development between the two communities is, at the very least, a limited success in the attempt of the human rights community to enter into the daily operations of its economic counterparts. It is not possible to discern with any degree of certainty whether this emerging pidgin language and the rights that it protects is, on balance, emerging as weighted more heavily in favor of rights or the economic domain. Nonetheless, the original political inequality of the two worlds exposes the imperative of maintaining strong human rights language in the negotiation over substantive institutional change.

The language that is born from the negotiations between the international economic and human rights domains is substantively important. If the European Bank for Reconstruction and Development's unconcealed reference to human rights in its statute<sup>209</sup> is a substantive victory, then it follows that the IMF's reluctance to use this term, by inventing the terms "social issues," "social dimensions," or "social integration," and the WTO's disinclination to even mention "social issues", falls short of this mark.

As a language is learned—and certainly as it is invented—it can limit the possibilities for substantive critique of a particular paradigm. Carol Cohn explains, "learning [a] language is a transformative, rather than an additive, process. When you choose to learn it you enter a new mode of thinking."<sup>210</sup> She illustrates that the language in

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<sup>208</sup> Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 3 (1988).

<sup>209</sup> Sirgun I. Skogly, *Book Review: Human Rights in the New Europe: Problems and Progress*, 89 A.J. INT'L. L. 242, 244 (1995).

<sup>210</sup> Carol Cohn, *Sex and Death in the Rational World of Defense Intellectuals*, 12 SIGNS 687, 716 (1987).

which a profession is framed has the effect of transforming the entire field and the individuals who participate therein. As a feminist and a peace-loving person, Cohn entered a year long program in which she was immersed in the world of defense intellectuals.<sup>211</sup> During the process of learning the specialized language of military strategy, she found that she could not use that language to express her *concerns* about militarization generally or about the sexism inherent in that language. For example, she explains, "the word 'peace' is not a part of this discourse. As close as one can come is 'strategic stability.'"<sup>212</sup> Immersed in the accepted discourse of the military community, she found it difficult to maintain the legitimacy of her convictions even within the safety of her own head.<sup>213</sup>

The encounters between the economic and human rights communities occur through the participation of the individuals who work or advocate within each of those communities. Their commonalties and sustained contact with one another hold risks for the advancement of human rights. Cohn's description of the totalizing effects of language modification, the ability of language modification to limit alternative avenues for social change, as well as its capacity to alter the substance of discourse and even the participants therein, suggest that in order to sustain the rhetorical power of rights language and the substance it carries with it, human rights advocates negotiating with their economics-focused counterparts must consciously retain the language of rights. Further, they must adamantly oppose language that demotes human rights from their elevated status as rights to that of "issues." This is important for the negotiations and discourse itself, and essential in the language used to describe any outcomes from the encounters in the form of statements, agreements, or treaties.

The compelling quality of human rights rhetoric has been a cornerstone of the argument that the international economic domain has a responsibility to incorporate human rights considerations into all its activities. The aspirations set out in the Universal Declaration of Human Rights and its progeny have the ability to move the imagination. This quality also has induced a wide range of communities and interest groups to use the human rights system for their own protection. Since the creation of the UDHR, human rights law has gained such popularity and achieved such status that nearly every modern

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<sup>211</sup> *Id.* at 688.

<sup>212</sup> *Id.* at 708.

<sup>213</sup> *Id.*



cause has sought to use the language of human rights to give it greater validity.<sup>214</sup>

When human rights advocates participate in negotiations with the international economic community, they represent all individuals who use the universal and regional mechanisms for human rights. Language compromises in these encounters may have a detrimental effect on the individuals who depend on the human rights system's protections when negotiations yield insufficient results. Negative outcomes immediately effect the ability to advance human rights through economic instruments. But the negative consequences do not stop there.

Language compromises have the effect of dominating the field of interaction between the human rights domain and the international economic domain with formal statements, agreements, or treaties that effectively take the form of precedents for future interactions. As such, these compromises may eliminate potential future actions on a particular problem. For example, maintaining a language that imperatively states that indigenous peoples have a right to self-determination and the right to control their own territory is a far stronger protection for indigenous peoples than language that suggests that the interests of indigenous peoples will be balanced against those of an economic actor wanting to make use of land traditionally occupied by indigenous peoples. These two options roughly model the protections declared by ILO Convention 107 and the relocation policies of the World Bank, respectively. The cost/benefit method employed in the second example, if widely adopted as a method for dealing with the issue of indigenous people's land rights, could have repercussions far beyond the specific example of the World Bank's compromise on the issue. It establishes a model and precedent for the future interaction of economic and social considerations that uses solely economic language, foreclosing the powerful rhetoric of the rights at the foundation of "social considerations" and "social issues."

Another example lies in the model of the international environmental movement. This model is now so economics based, that countries may soon be able to purchase and sell pollution rights on trading floors. It provides a good example of the defeats inherent in adopting economic language for the protection of what was previously imagined as an absolute right. While such a trading system may advance the goals of reducing overall carbon-dioxide emissions, it also margi-

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<sup>214</sup> Howse & Mutua, *supra* note 7, ¶ 3.

nalizes the morally-based idea that humans over-consume, and that their over-consumption is inherently bad for the planet. It also virtually eliminates the utopian vision of a world without pollution. Creating a permanent and legitimate market for pollution certainly has the global effect of marginalizing the idealistic language of environmental rights. This example argues for avoiding this model of language adaptation while inventing the mechanisms for the international economic community and the human rights community to cooperate. It also demonstrates the human rights community's primary responsibility to maintain and advance the strength of the individuals it aims to protect.

### CONCLUSION

*Our reconstructive task is a task of creating compelling alternative visions of possible futures, a task of recognizing and developing alternative conceptions of rationality, a task of creating rich and imaginative alternative voices—diverse voices whose conversations with each other will invent those futures.*<sup>215</sup>

At this early stage of interactions between international human rights advocates and international economic actors, the task for human rights advocates at the points of contact discussed in Part III is to retain the compelling and utopian language of rights. As alternative language such as that evidenced by the creation of terms such as "social issues," "social concerns," and "social integration" has clearly started to emerge from these contacts, rights advocates should carefully consider the implications of compromising intact human rights language.

Rights negotiators can more successfully maintain a strong rights-based language if they are conscious of the implications of conceding to new language that is overly dominated by economic rhetoric and tools, as has occurred in the encounter between the international economic and international environmental entities. To maintain the full impact of the utopian vision of the human rights system, it is better to employ imagination than to concede to what is simply the best among pre-existing options. In this way, rights negotiators can arrive at what is truly best for the advancement of human rights. The language that emerges from this imaginative effort will be the language

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<sup>215</sup> Cohn, *supra* note 210, at 718.

that connects the two domains and determines how international economic institutions and actors will integrate, protect, and enforce human rights. It will also determine which rights they will allow to influence their activities.

It is essential to retain a "plain language" with respect to human rights. As advocates of the plain language movement have noted, the purpose of drafting in plain language is to enhance democracy and the rule of law, by ensuring it is accessible to all people and that all people understand that the language applies to them.<sup>216</sup> Given that human rights have attained a high level of universal institutional, governmental, and popular familiarity, maintaining a clear human rights language is essential. The imperative of using clear language is especially strong in the context of human rights, where violations of established law and standards results in violations of human dignity. The language of human rights, in order to be understood by those it aims to protect, must, above all, be intelligible and accessible.<sup>217</sup>

As pidgin languages mature and are adopted by future generations as their own native tongues, they are termed "Creole" languages. One characteristic of Creole languages is the totalizing effect they have on the new generation that knows neither of the original languages from which the pidgin language emerged. The rapid formation of international economic language, international human rights language, and the pidgin language they are forming in their contact with one another suggests that both communities have a capacity for rapid creation and transmutation of language. Accordingly, the future Creole generation that will barely remember an era in which these two communities did not cooperate is already rising. In considering these future generations, human rights advocates and negotiators have a responsibility to advance a language that retains real as well as rhetorical potency in order to sustain the potential for utopian imagination so traditionally inherent in the human rights movement.

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<sup>216</sup> Ruth Sullivan, *The Promise of Plain Language Drafting*, 47 MCGILL L.J. 97, 98 (2001).

<sup>217</sup> See Barbara Stark, "Violations of Human Dignity" and Postmodern International Law, 27 YALE J. INT'L L. 315, 315 (2002).